Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALEXANDER P. SOMMER,
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

There is a single question presented in this petition.

Did the Court of Appeals for the Ninth Circuit commit judicial error by concluding that in an ERISA case a beneficiary under a long-term disability plan is barred by the doctrine of res judicata from filing a second lawsuit to enforce his or her entitlement to benefits, after *subsequently* exhausting his or her administrative remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CITATION TO THE OPINION BELOW	1
STATEMENT OF JURISDICTION	1
FEDERAL STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	7
1. THIS COURT SHOULD ESTABLISH AS A RULE OF LAW THAT WHENEVER A CASE BROUGHT BY AN ERISA BENEFICIARY IS INITIALLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, THE BENEFICIARY MAY RESUBMIT HIS OR HER CLAIM TO THE PLAN ADMINISTRATOR OR THE INSURANCE COMPANY AND, AFTER SUBSEQUENTLY EXHAUSTING WHATEVER ADMINISTRATIVE REMEDIES ARE AVAILABLE, THE BENEFICIARY MAY FILE A SECOND LAWSUIT IN FEDERAL DISTRICT COURT TO ESTABLISH HIS OR HER BENEFITS UNDER THE APPLICABLE PLAN OR INSURANCE POLICY	8
CONCLUSION	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).....8, 13

Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961) 10

Blonder-Tongue Laboratories v. Univ. of Ill. Found., 402 U.S. 313 (1971)..... 9

Communications Workers of America v. American Telephone and Telegraph, 40 F.3d 426 (D.C. Cir. 1994).....13

Costello v. United States, 365 U.S. 265 (1961).....12

Criales v. American Airlines, 105 F.3d 93 (2d Cir. 1997)..... 6

Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust, 50 F.3d 1478 (9th Cir. 1995).....8, 10, 13

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)..... 9

Heath v. Cleary, 708 F.2d 1376 (9th Cir. 1983).....10

Makar v. Health Care Corp. of Mid-Atlantic (Care-first), 872 F.2d. 80 (4th Cir. 1989).....13

Sarraf v. Standard Ins. Co., 102 F.3d 991 (9th Cir. 1996).....13

FEDERAL STATUTES

28 U.S.C. §1252(1) 1

29 U.S.C. §1132(a)..... 1

29 U.S.C. §1132(g).....15

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. §§1001-1461 1

42 U.S.C. §1983 10

RULES

Federal Rules of Civil Procedure, Rule 41(b) 11

OTHER AUTHORITIES

Wright, Miller & Cooper, *Federal Practice and Procedure*, Volume 18, §4436 10

Moore's Federal Practice, 3rd Ed., Vol. 18, §131.30(3)(b) 11

Restatement of the Law Second, Judgments 2d, §20(2) 11

CITATION TO THE OPINION BELOW

The unreported opinion of the Court of Appeals for the Ninth Circuit is reprinted in the accompanying Appendix ("App.") at pages 1 through 8.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1252(1). The Ninth Circuit's opinion was filed on May 10, 2002. This Petition for Certiorari is being filed within 90 days of the Ninth Circuit's opinion as required by Supreme Court Rule 13.1

FEDERAL STATUTE INVOLVED

This case involves the interpretation of a statute under what is called the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461.

The ERISA statute cited in this Petition is found in 29 U.S.C. §1132(a) which provides in relevant part:

§1132. Civil enforcement

(a) **Persons empowered to bring a civil action**

A civil action may be brought –

(1) By a participant or a beneficiary –

. . . .

(B) To recover benefits due to him under the terms of his plan, to enforce his rights under

> the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . . .

STATEMENT OF THE CASE

On May 22, 1996 Petitioner Alexander P. Sommer (hereafter "Petitioner") filed a complaint in the San Francisco Superior Court against Respondent UNUM Life Insurance Company of America (hereafter "Respondent") to enforce benefits under a long-term disability insurance plan administered by Respondent as part of an employee benefits program. Although Petitioner alleged three separate ERISA claims under three separate long-term disability insurance plans, for purposes of this Petition the only insurance plan at issue is the one provided by Respondent to Petitioner's last employer, a securities dealer known as Wedbush Morgan Securities ("Wedbush").

On July 2, 1996 Respondent removed the case to federal district court claiming federal jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"). After hearing argument on Respondent's motion to dismiss, the district court granted that motion on the ground that Petitioner had failed to exhaust his administrative remedies.

On August 18, 1997 Petitioner filed a timely notice of appeal. In an unpublished opinion dated March 24, 1999, the Court of Appeals for the Ninth Circuit affirmed.

Thereafter, Petitioner resubmitted his claim to Respondent in an attempt to exhaust his administrative

remedies. After Respondent failed to administer Petitioner's resubmitted claim, on April 20, 2000 Petitioner filed a second lawsuit against Respondent based upon the same claim. On January 8, 2001 the district court dismissed the second lawsuit, on the ground that it was barred by the doctrine of res judicata.

On April 9, 2001 Petitioner filed a timely notice of appeal. In an unpublished decision dated May 10, 2002, the Court of Appeals for the Ninth Circuit affirmed.

STATEMENT OF FACTS

Petitioner was employed as an account executive from November 1988 through December 1992, for a company called Henry F. Swift & Co. ("Swift"), a securities firm. Throughout Petitioner's employment with Swift, The Paul Revere Insurance Company ("Paul Revere") issued long-term disability insurance coverage to Swift's employees such as Petitioner. After Swift merged with a company called Piper Jaffray, Inc. ("Piper") in January 1993, Petitioner worked as an account executive for Piper. However, in August 1994 Piper fired Petitioner for lack of production. Approximately one month later Petitioner obtained employment as an account executive at Wedbush where he was employed from September 1994 through January 1996. In January 1996, Petitioner's poor health forced him to terminate permanently his employment. During all of the time Petitioner worked for Piper and Wedbush, Respondent issued long-term disability insurance coverage to Piper and Wedbush employees such as Petitioner.

In November 1988, while employed by Swift, Petitioner became ill and was required to undergo three

separate brain surgery procedures, including a left carotid embolization, a subsequent arteriovenous malformation clipping, and, several weeks later, an evacuation of an abscess in the same general region as the arteriovenous malformation. Subsequent to these surgeries, Petitioner suffered four significant seizures, two of which appear to have been grand mal.

Petitioner alleges that as a result of these three brain surgery procedures, he was totally disabled during the times he was employed by Swift, Piper, and Wedbush.

On January 15, 1990 Petitioner filed a claim for disability benefits payable under the Paul Revere policy issued to Swift's employees, which was rejected by Paul Revere on February 7, 1990. In September 1994 Petitioner filed a claim for disability benefits payable under Respondent's policy issued to Piper's employees, which was rejected on January 10, 1995. On January 26, 1996 Petitioner filed a claim for disability benefits payable under Respondent's policy issued to Wedbush's employees, which was rejected on April 24, 1996. Finally, Petitioner submitted a second claim to Paul Revere on May 30, 1996, which was rejected on July 18, 1996.

On May 22, 1996 Petitioner filed a complaint in the San Francisco Superior Court against Respondent, and later in an amended pleading also against Paul Revere, for breach of contract and for breach of the duty of good faith and fair dealing. On July 2, 1996 Respondent removed the case to federal district court claiming federal jurisdiction under ERISA.

After considering both written and oral argument, on June 17, 1997 the district court dismissed all of Petitioner's claims. With respect to Paul Revere's policy issued

to Swift's employees the district court found that the claim was barred by the statute of limitations; with respect to Respondent's policy issued to Piper's employees the district court found that Respondent did not abuse its discretion in determining that Petitioner was not disabled while he was employed at Piper; and with respect to Respondent's policy issued to Wedbush's employees the district court found that Petitioner had failed to exhaust his administrative remedies.

On August 18, 1997 Petitioner filed a timely notice of appeal with respect to all three of these adverse district court decisions. In an unpublished decision dated March 24, 1999 the Court of Appeals for the Ninth Circuit affirmed, and with respect to Petitioner's Wedbush claim the Court of Appeals found that the district court did not abuse its discretion in determining that Petitioner had failed to exhaust his administrative remedies.

Thereafter, in February 2000 Petitioner resubmitted his claim to Respondent and attempted to exhaust his administrative remedies under Respondent's policy issued to Wedbush's employees. A month later, in March 2000, Respondent rejected Petitioner's resubmitted claim. Thereafter, on April 20, 2000, Petitioner filed a second lawsuit against Respondent under the terms of its Wedbush policy. Respondent moved to dismiss this second complaint on the ground that it was barred by the doctrine of res judicata. In making that motion, Respondent argued that Petitioner's second complaint, filed in April 2000, involved the same parties and the same issues as the earlier complaint that was dismissed by the district court in 1997. Petitioner countered by arguing that the doctrine of res judicata did not apply because the previous lawsuit against Respondent under the Wedbush policy was not

decided on the merits, and therefore the doctrine of res judicata did not apply.

The district court agreed with Respondent that the doctrine of res judicata applied, and dismissed Petitioner's second lawsuit on that ground.[1]

On April 9, 2001 Petitioner filed a timely notice of appeal. In an unpublished decision dated May 10, 2002 (see App. 1 through 9), the Court of Appeals for the Ninth Circuit affirmed.

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[1] In the decisions of the Court of Appeals and the district court below (App. 4-5, 19-23), there was considerable discussion concerning the difference between "summary judgment" and "dismissal judgment." The Court of Appeals and the district court contended that because Petitioner's first lawsuit resulted in a "summary judgment," that constituted a decision on the merits. Petitioner urges that such a distinction has no merit. What controls here is not the "choice of labels" used to characterize a judgment, "especially where the consequence would be so drastic as to deprive a party of the opportunity to be heard." *Criales v. American Airlines*, 105 F.3d 93, 97 (2d Cir. 1997). This means that the court must look past the label used for the dismissal of Petitioner's first lawsuit and examine the substance of the pleadings therein. It is undisputed that in those pleadings the only reason Petitioner's claim under the Wedbush version of Respondent's policy was dismissed was due to Petitioner's failure to exhaust his administrative remedies. That "substance" clearly means that Petitioner's first lawsuit was dismissed for lack of jurisdiction, and not on the merits, and it should not make any difference whether the label "summary judgment" or "dismissal judgment" was used by the court in that first lawsuit.

REASONS FOR GRANTING THE WRIT

As previously indicated in this Petition, there is a single issue presented for the Court to consider, namely, whether an ERISA beneficiary who loses his or her first lawsuit due to failure to exhaust administrative remedies may file a second lawsuit after exhausting those administrative remedies.

The exhaustion of administrative remedies issue is important because this defense is being increasingly asserted by insurance companies to defend ERISA cases. These insurance companies now have at least two and often three or more layers of administrative review, and as a consequence a beneficiary claimant, such as Petitioner, often may not know with total certainty whether he or she has exhausted all administrative remedies before bringing suit in federal district court to recover ERISA benefits. In view of the fact that there are literally millions of people in the United States who are eligible for ERISA benefits, the Court should grant this Petition and review this issue of exhaustion of administrative remedies so that there is a uniform rule established throughout the United States to allow ERISA beneficiaries to resubmit their claims whenever their first claim is dismissed, not on the merits, but due to failure to exhaust administrative remedies.

1. THIS COURT SHOULD ESTABLISH AS A RULE OF LAW THAT WHENEVER A CASE BROUGHT BY AN ERISA BENEFICIARY IS INITIALLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, THE BENEFICIARY MAY RESUBMIT HIS OR HER CLAIM TO THE PLAN ADMINISTRATOR OR THE INSURANCE COMPANY AND, AFTER SUBSEQUENTLY EXHAUSTING WHATEVER ADMINISTRATIVE REMEDIES ARE AVAILABLE, THE BENEFICIARY MAY FILE A SECOND LAWSUIT IN FEDERAL DISTRICT COURT TO ESTABLISH HIS OR HER BENEFITS UNDER THE APPLICABLE PLAN OR INSURANCE POLICY.

Early in ERISA's history, the Court of Appeals for the Ninth Circuit announced as a general rule that an ERISA claimant must avail himself or herself of a plan's own internal review procedures before bringing suit in federal district court. *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980). This holding in *Amato* has been followed in other Circuits. *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, at footnote 3 (9th Cir. 1995).

While it is true that the text of ERISA nowhere mentions the exhaustion doctrine, courts have concluded from both the legislative history and from the text of ERISA that Congress intended to grant such authority to the courts, and that policy requires the application of the exhaustion doctrine in suits brought under the ERISA Act. *Amato v. Bernard*, *supra*, at p. 568.

Petitioner does not dispute the validity of Ninth Circuit case law which requires an ERISA beneficiary to

exhaust his or her administrative remedies prior to bringing suit to enforce those remedies in federal district court.

Instead, the issue here concerns what happens after the first lawsuit for ERISA benefits is dismissed for failure to exhaust administrative remedies. Petitioner contends that long-standing case law and textbook authorities all support the conclusion that the defense of failure to exhaust administrative remedies is a plea abatement, not a decision on the merits, therefore the ERISA claimant, after unsuccessfully resubmitting his or her claim to the plan or to the insurance company, has the right to file a second lawsuit to establish benefits due under the plan or the insurance policy and that second lawsuit would not be barred by the doctrine of res judicata because the first lawsuit was not decided on the merits, and one of the requirements for applying the doctrine of res judicata is that the first lawsuit must be decided on the merits. See, for example, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"). See, also, *Blonder-Tongue Laboratories v. Univ. of Ill. Found.*, 402 U.S. 313, 323-324 (1971).

Thus the question presented here is whether in an ERISA case the dismissal of a prior lawsuit for failure to exhaust administrative remedies was a trial on the merits. The Ninth Circuit, has concluded that such a prior dismissal in an ERISA case is to be treated as a dismissal on the merits and therefore in an ERISA case a beneficiary may not file a second lawsuit to establish his or her claim after resubmitting the claim to the plan or to the insurance company in an effort to exhaust whatever administrative remedies are available. This holding by the Ninth

Circuit is contrary to the long-standing case law authority and other authority on this issue, and is inconsistent with ERISA's background, structure and legislative history which is based upon the reduction of frivolous litigation, the promotion of consistent treatment of claims, a nonadversarial method of claim settlement, the minimization of costs of claims settlement and a proper reliance on administrative expertise. *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, *supra*, at p. 1483.

In cases not involving ERISA, the Ninth Circuit has consistently held that dismissal on the ground that a claimant has failed to exhaust his or her administrative remedies is not a dismissal on the merits. *Heath v. Cleary*, 708 F.2d 1376, 1380 (9th Cir. 1983) (a civil rights action under 42 U.S.C. §1983 (1976)). See also *Bland v. Connally*, 293 F.2d 852, 855 (D.C. Cir. 1961).

The commentators on federal practice uniformly agree that dismissal for failure to exhaust administrative remedies is not a decision on the merits. For example, in Wright, Miller & Cooper, *Federal Practice and Procedure*, Volume 18, §4436, these writers state:

> There is little mystery about the res judicata effects of a judgment that dismisses an action for lack of subject or personal jurisdiction or for improper venue. Civil Rule 41(b) provides that a dismissal for lack of jurisdiction or improper venue does not operate as an adjudication upon the merits. *This provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action.* . . . Similar effects attend dismissals that rest on matters closely related to jurisdiction, such as justiciability or a requirement of

prior resort to an administrative agency. (Emphasis added.)

See also *Moore's Federal Practice,* 3rd Ed., Vol. 18, §131.30(3)(b):

> Ordinarily, a judgment for the plaintiff is necessarily a judgment on the merits, since a judgment granting the requested relief necessarily established the claim. However, the defendant may sometimes prevail because the court determines that it has no subject matter jurisdiction, that personal jurisdiction of defendants or of indispensable parties is lacking, that venue is improper, *or that plaintiff has failed to comply with some prerequisite to filing suit, such as exhaustion of administrative remedies. In such cases, the resulting judgment of dismissal is not a determination of the claim, but rather a refusal to hear it, and the plaintiff may thereafter pursue it in an appropriate forum or when the preconditions have been met.* (Emphasis added.)

The same result is found in the *Restatement of the Law Second, Judgments 2d*, §20(2) which provides:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

The Supreme Court, in a leading case, has reached this same conclusion. In construing Federal Rules of Civil Procedure, Rule 41(b), which pertains to involuntary dismissals, the Court has interpreted the rule's "lack of

jurisdiction" exception broadly, giving the concept of "jurisdiction" meaning beyond its traditional personal and subject matter usages:

> [T]he exception . . . encompass[es] those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

Costello v. United States, 365 U.S. 265, 285 (1961).

All of these authorities, taken together, uniformly hold that a dismissal of a case due to failure to exhaust administrative remedies is a plea in abatement, not a decision on the merits, and therefore the plaintiff has the right to file a second lawsuit after satisfying whatever procedural impediment may have existed, without fear of having the second lawsuit dismissed because of the doctrine of res judicata.

When confronted with this issue, the Ninth Circuit in this case made no attempt to analyze or discuss this issue. Instead, its entire decision rests upon the following conclusion:

> Sommer argues that res judicata does not apply because Judge Jensen did not, in fact, issue a final judgment on the merits in *Sommer I*. Sommer claims that his failure to exhaust his administrative remedies should have resulted in a dismissal without prejudice rather than summary judgment. Sommer is incorrect. *Summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies.* (App. 4.) (Emphasis added.)

The only authority the Ninth Circuit cited for this remarkable conclusion is the *Diaz* case (*Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust*, *supra*, 1430); and the *Sarraf* case (*Sarraf v. Standard Ins. Co.*, 102 F.3d 991, 992 (9th Cir. 1996)). However, an examination of both of those cases indicates that they do not in any way support the Ninth Circuit's conclusion that a dismissal of a case for failure to exhaust administrative remedies is a dismissal on the merits. Instead, the *Diaz* and *Sarraf* cases merely hold that the first case brought by an ERISA claimant may be dismissed for failure to exhaust administrative remedies. There is no discussion in those cases regarding the consequences of a second lawsuit filed by the same ERISA claimant after subsequently exhausting his or her administrative remedies.

The district court's decision in this matter, dated April 9, 2001, which can be found at App. 9 through 24, starts off by citing Ninth Circuit cases, including for example, *Amato v. Bernard*, *supra*, at pp. 567-8, which contemplate that a plaintiff in an ERISA case could return to federal court after exhausting administrative remedies. *Amato*, at 569 ("The court will still be open to Amato when he has exhausted his appeals before the trust. . . . "). The district court also noted that other courts have similarly contemplated the return of the plaintiff to court after exhaustion in the ERISA context citing, for example, *Communications Workers of America v. American Telephone and Telegraph*, 40 F.3d 426, 434 (D.C. Cir. 1994); *Makar v. Health Care Corp. of Mid-Atlantic* (Carefirst), 872 F.2d. 80, 83 (4th Cir. 1989). (App. 15.)

The district court, after citing these cases, then attempts to evade the issue by concluding that since the district court in Petitioner's first case granted summary

judgment rather than dismissal, it was a decision on the merits and such a decision on the merits is proper in an ERISA case. (App. 23.) (See footnote 1, *supra*, for discussion of this distinction between "summary judgment" and "dismissal judgment".)

In summary, then, both the district court and the Court of Appeals for the Ninth Circuit failed to cite any authority for justification of their conclusion that in an ERISA case when the first lawsuit has been dismissed for failure to exhaust administrative remedies such a decision is a decision on the merits which bars the filing of a second lawsuit based upon the same claim. Such a conclusion is illogical and is unsupported by all leading case authority and all text book authority.

Equally important, such a conclusion is inconsistent with the overall purpose of ERISA, which is to allow claimants ready access to benefits whenever they are entitled to them. Increasingly, plans and insurance companies, with many layers of administrative review, are using this failure to exhaust defense to thwart these claims. Petitioner urges that whenever this occurs, the claimant should have the right to pursue his or her claim after subsequently exhausting those administrative remedies, and there are no provisions in the ERISA

statute itself or in the historical development of ERISA which prevent such a claimant from doing so.[2]

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully urges this Court to grant certiorari so that a uniform ERISA rule is established indicating that an ERISA lawsuit that is dismissed initially for failure to exhaust administrative remedies may be refiled after the ERISA beneficiary subsequently exhausts those administrative remedies, and that the doctrine of res judicata would not bar the filing of that subsequent lawsuit.

Respectfully submitted,

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[2] In a separate but related matter, the district court below granted Respondent's motion for Rule 11 sanctions and for attorney's fees pursuant to 29 U.S.C. §1132(g). On appeal, the Ninth Circuit affirmed. (App. 5-8.) Petitioner and his counsel continue to object to the imposition of these Rule 11 sanctions and these attorney's fees pursuant to §1132(g). In the event this Petition is granted and the Court issues a writ of certiorari, Petitioner and his counsel urge the Court to sustain these objections and to order that these Rule 11 sanctions and these attorney's fees pursuant to §1132(g) be set aside.

APPENDIX
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER P. SOMMER, Plaintiff-Appellant, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	Nos. 01-15733 D.C. No. CV-00-1368 SBA (Filed May 10, 2002)
ALEXANDER P. SOMMER, an individual, Plaintiff, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, a corporation, Defendant-Appellee, JOHN G. WARNER, Real-party-in-interest-Appellant.	No. 01-15734 D.C. No.CV-00-01368-SBA

ALEXANDER P. SOMMER, an individual,

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY, a corporation, et al.,

Defendants-Appellees.

No. 01-15735
D.C. No.
CV-96-02407-
DLJ(PJH)

ALEXANDER P. SOMMER, an individual,

Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, a corporation;,

Defendant-Appellee,

JOHN G. WARNER,

Real-party-in-interest-Appellant.

No. 01-15736
D.C. No.
CV-00-1368-SBA
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted April 11, 2002
San Francisco, California

Before SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

Beginning in the mid-1990s, Appellant Alexander Sommer sought disability benefits under policies he obtained through his employer, Wedbush. Following denial of benefits by appellee UNUM, he sued in federal court.

This panel's consideration is the fifth given to this case in the federal courts. District Court Judge Jensen issued a final judgment in *Sommer I*. This court affirmed the summary judgment. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 U.S. App. LEXIS 5388 (9th Cir. 1999). Sommer filed his claim with the company again. His claim was for the same disability and the same policy, so UNUM rejected it again. Following this second rejection, Sommer filed his second suit in federal district court. In *Sommer II*, District Judge Armstrong dismissed the case based on lack of jurisdiction because *Sommer I* was pending before the Ninth Circuit and also imposed $1,000 in Rule 11 sanctions. She noted that even if the court did have jurisdiction, *Sommer II* would be barred by res judicata as a result of *Sommer I*. This court agreed, affirming on res judicata grounds. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 U.S. App. LEXIS 5382 (9th Cir. 1999). After yet another rejection of the same disability claim by UNUM, Sommer brought a third suit, again in Judge Armstrong's court. The district court dismissed *Sommer III* on res judicata grounds. The district court also imposed $2,500 in Rule 11 sanctions and assessed attorneys' fees and costs against Sommer's attorney pursuant to 29 U.S.C. § 1132(g)(1).

Sommer appeals these *Sommer III* decisions, as well as Judge Jensen's refusal to amend his final judgment in *Sommer I* per Sommer's Rule 60(a) motion. We have

jurisdiction over all of Sommer's claims pursuant to 28 U.S.C. § 1291. We affirm the *Sommer III* district court's decision in all respects. We also affirm the *Sommer I* court's denial of Sommer's Rule 60(a) motion for correction of a clerical mistake.

Because the parties are familiar with the facts underlying Sommer's appeal, we repeat them only as necessary.

Sommer claims that District Judge Armstrong erred when she granted UNUM summary judgment in *Sommer III* on res judicata grounds. We review an order granting summary judgment de novo. *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021 (9th Cir. 2001). To trigger the doctrine of res judicata, the earlier suit must have (1) involved the same "claim" or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies. *Sidhu v. Flecto Co.,* 279 F.3d 896, 900 (9th Cir. 2002).

Sommer argues that res judicata does not apply because Judge Jensen did not, in fact, issue a final judgment on the merits in *Sommer I.* Sommer claims that his failure to exhaust his administrative remedies should have resulted in a dismissal without prejudice rather than summary judgment.

Sommer is incorrect. Summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies. *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust,* 50 F.3d 1478, 1480 (9th Cir. 1995); *Sarraf v. Standard Ins. Co.,* 102 F.3d 991, 992 (9th Cir. 1996). Judge Jensen recognized as much by citing *Denton v. First Nat'l Bank,* 765 F.2d 1295 (5th Cir. 1985), which holds that, although remand is often desirable,

summary judgment is also appropriate where a plaintiff has failed to exhaust remedies.

Next Sommer argues that Judge Armstrong abused her discretion when she imposed Rule 11 sanctions in *Sommer III*. Orders imposing Rule 11 sanctions are reviewed for an abuse of discretion. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 788 n.16 (9th Cir. 2001). A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 (9th Cir. 1999).

Judge Armstrong imposed Rule 11 sanctions after finding that the *Sommer III* complaint was frivolous in light of *Sommer I* and *Sommer II*. We agree. As Judge Armstrong noted, Sommer's counsel "should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of res judicata." This court held in *Sommer II* that res judicata barred the claims, thus foreclosing relitigation of whether or not there was a final judgment in *Sommer I*. Seeking another bite at the apple by filing *Sommer III* in the hope of a different result was frivolous. Judge Armstrong did not abuse her discretion when she imposed sanctions under Rule 11.

Sommer also challenges Judge Armstrong's order requiring Sommer's attorney to pay $6,574.85 in attorneys' fees and costs to UNUM. Judge Armstrong imposed sanctions under ERISA pursuant to 29 U.S.C. § 1132(g)(1). That section provides:

> In any action under this subchapter (other than an action described in paragraph (2)) by a participant,

> beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

In *Hummell v. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980), we set out five factors a court should consider in exercising its discretion to award fees and costs under § 1132(g)(1): (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Id.*

We review an award of attorneys' fees pursuant to ERISA under an abuse of discretion standard. *Id.* at 452. We will find an abuse of discretion only when we have a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors. *Id.*

Sommer does not argue with the district court's specific findings with respect to the *Hummell* factors. Instead, he argues that Judge Armstrong did not have the authority to impose the fees and costs on his attorney because counsel was not "a participant, beneficiary, or fiduciary" per § 1132(g)(1). Sommer is mistaken in his reading of the statute. Section 1132(g)(1) requires only that the underlying action be brought by a participant, beneficiary, or fiduciary. The text in no way limits the imposition of fees and costs to those entities. Judge Armstrong stated as much in her order, citing *Corder v. Howard Johnson & Co.*, 53 F.3d 225 (9th Cir. 1994) ("Where

one of the above enumerated parties – participant, beneficiary, or fiduciary – brings an action, the district court has discretion to award attorney's fees to either plaintiffs or defendants.") Judge Armstrong considered each *Hummell* factor carefully and concluded that *Hummell* factors 1, 2, 3, and 5 weighed strongly in favor of imposing attorneys' costs and fees against Sommer's counsel. She did not abuse her discretion in awarding UNUM fees and costs.

Sommer's final claim arises out of *Sommer I* and is very similar to his res judicata argument in *Sommer III* (see above). While *Sommer III* was pending before Judge Armstrong, Sommer filed a motion with Judge Jensen pursuant to Rule 60(a). In it, Sommer argued that Judge Jensen's designation of his final order in *Sommer I* as a "summary judgment" rather than a "dismissal judgment" was a clerical error.

Rule 60(a) provides that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party or after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

In his denial of Sommer's Rule 60(a) motion, Judge Jensen made clear that there was, in fact, no clerical error: he intended his June 17, 1997 order in *Sommer I* to be a summary judgment, and not a dismissal without prejudice. As discussed above, either was within the district court's authority because Sommer had failed to exhaust

his administrative remedies as ERISA requires. Furthermore, Rule 60(a) applies during the pendency of an appeal. By the time Sommer filed his Rule 60(a) motion, the *Sommer I* appeal had been over for nearly two years.

We affirm the judgments of both district courts. We will not entertain a motion for any additional damages pursuant to Rule 38. These cases are concluded.

AFFIRMED.

UNITED STATES DISTRICT COURT

For the Northern District of California

ALEXANDER P. SOMMER, Plaintiff, V. UNUM LIFE INSURANCE CO. OF AMERICA, et al., Defendants.	No. C-96-02407-DLJ **ORDER** (Filed Apr. 9, 2001)

On February 9, 2001, plaintiff filed a Motion to Correct a Clerical Mistake pursuant to Federal Rule of Civil Procedure 60(a). Defendant UNUM Life Insurance Co. filed an opposition on February 27, 2001, and plaintiff replied on March 6, 2001. Having considered the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiff's motion.

I. BACKGROUND

A. Factual Background and Procedural History

This litigation concerns plaintiff Alexander P. Sommer's repeated attempts to receive long-term disability benefits under the disability insurance policies of his securities firm employers. Plaintiff was employed as an account executive for Henry F. Swift & Co. ("Swift"), a securities firm, from November 1988 through December 1992. Throughout plaintiff's employment with Swift, defendant The Paul Revere Life Insurance Company ("Paul Revere") issued long-term disability insurance policies to employees such as plaintiff. After Swift merged with Piper Jaffray, Inc. ("Piper") in January 1993, plaintiff

continued to work as an account executive for Piper. However, plaintiff was fired by Piper in August 1994 for lack of production. Approximately one month later, plaintiff obtained employment as an account executive at Wedbush Morgan Securities ("Wedbush"), where he was employed from September 1994 through January 1996. In January 1996, plaintiff's poor health forced him to terminate this employment. While plaintiff worked for both Piper and Wedbush, defendant UNUM Life Insurance Company of America ("UNUM") issued long-term disability policies to employees such as plaintiff.

In November 1988, while employed by Swift, plaintiff fell ill and was eventually required to undergo three separate brain surgeries. Plaintiff alleges that as a result of these surgeries, he was totally disabled during the times he was employed by Swift, Piper, and Wedbush, due to organic brain deficits. On January 15, 1990, plaintiff filed a claim for disability benefits with Paul Revere, which was rejected on February 7, 1990. In September 1994, plaintiff filed a claim with UNUM for disability benefits payable under the terms of the Piper policy. On July 10, 1995, plaintiff's claim was rejected by UNUM. On January 26, 1996, plaintiff filed a disability claim with UNUM under the Wedbush policy. That claim was denied by UNUM on April 24, 1996. In addition, plaintiff submitted a second claim to Paul Revere on May 30, 1996, which was denied on July 18, 1996.

On May 22, 1996, plaintiff filed a complaint in San Francisco superior Court against UNUM and twenty DOE defendants for breach of contract and breach of the duty of good faith and fair dealing. On July 2, 1996, defendant UNUM removed the case to federal court claiming federal jurisdiction under the Employee Retirement Income Security

Act of 1974 (ERISA), 29 U.S.C. § 1144(a) & (b)(2)(A). This Court granted plaintiff leave to file a first amended complaint alleging ERISA claims against defendants UNUM, Paul Revere, Swift, Piper, and Security Industry Benefits Services, a plan administrator for Wedbush.

Plaintiff's First Amended Complaint, filed on September 6, 1996, alleged two causes of action under ERISA ("*Sommer I*"). First, plaintiff asserted a claim under the civil enforcement provisions of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recovery benefits owed to him under the terms of the benefit plans. Second, plaintiff asserted a claim for equitable relief, pursuant to 29 U.S.C. § 1132(a)(3), seeking to compel defendants to pay him future benefits owed under the terms of defendants' respective policies.

On February 10, 1997, Swift, Piper, and Security Industry Benefits Services were dismissed as defendants in this action pursuant to a stipulation by the parties, leaving defendants Paul Revere and UNUM in the action.

Plaintiff then filed various motions: to file a second amended complaint, to augment the administrative record, and for appointment of guardians ad litem. Meanwhile, remaining defendants Paul Revere and UNUM moved for summary judgment on all of plaintiff's claims. On June 17, 1997, the Court issued an Order granting summary judgment for defendants. Judgments in favor of defendants were entered that same day. In granting summary judgment for defendant Paul Revere, the Court found that the statute of limitations had run on plaintiff's claim. *See* Order of June 17, 1997 at 11-16. In granting summary judgment for defendant UNUM, the Court found that plaintiff had failed to exhaust his administrative remedies regarding the Wedbush policy, since he did not appeal the

denial of benefits to UNUM's Quality Review Section, as required by the terms of the policy. *See id.* at 30-31.

On June 30, 1997, plaintiff filed a motion for reconsideration of the summary judgment order pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. On August 4, 1997, the Court denied plaintiff's motion for reconsideration. *See* Order of August 4, 1997. Plaintiff timely appealed the summary judgment and reconsideration orders to the Ninth Circuit.

During the pendency of the appeal to the Ninth Circuit, plaintiff filed a subsequent complaint on November 13, 1997. This complaint alleged essentially the same facts and claims as the Second Amended Complaint, and the case came before Judge Saundra Brown Armstrong of this District ("*Sommer II*"). Judge Armstrong ruled that the court did not have jurisdiction to adjudicate the issues presented because all of plaintiff's claims were then currently being appealed to the Ninth Circuit from the action before this court, *Sommer I. See Sommer v. Unum Life Ins. Co., et al.*, No. C-97-4159-SBA (N.D. Cal. Mar. 27, 1998) ("*Sommer II*"). Further, Judge Armstrong found that even if the court had jurisdiction, plaintiff's claims would be barred by res judicata. Judge Armstrong sanctioned plaintiff $1000 pursuant to Rule 11 of the Federal Rules of Civil Procedure. *See id.* On March 26, 1998, plaintiff moved for reconsideration of Judge Armstrong's March 27, 1998 order. Judge Armstrong rejected plaintiff's arguments that res judicata did not apply, and denied plaintiff's motion. *See Sommer v. Unum Life Ins. Co., et al.*, No. C-97-4159-SBA (N.D. Cal. April 21, 1998). Plaintiff then timely appealed Judge Armstrong's rulings to the Ninth Circuit.

On March 24, 1999, the Ninth Circuit affirmed *Sommer I* and *Sommer II*. *See Sommer v. Unum Life Ins. Co., et al.*, Nos. 97-16564, 98-16340 (9th Cir. Mar. 24, 1999). The Ninth Circuit did not explicitly comment upon this Court's grant of summary judgment to defendant UNUM regarding the Wedbush policy.

On April 20, 2000, plaintiff filed a third complaint against UNUM, again seeking damages for an unlawful denial of benefits under ERISA ("*Sommer III*"). Judge Armstrong dismissed the complaint on defendant's motion on the grounds of res judicata, and sanctioned plaintiff $2,500. *See Sommer v. UNUM Life Insurance,* No. 00-01368-SBA (N.D. Cal. January 8, 2001). Judge Armstrong found that the complaint was frivolous, and that plaintiff's counsel "should have known, after *Sommer I* and *Sommer II,* that the claim for benefits under the Wedbush policy was barred by the doctrine of res judicata." *See id.* at 5.

Plaintiff now moves, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, to correct a clerical mistake contained in the June 17, 1997 Order of this Court. Defendant UNUM opposes and moves for sanctions, and the motions are now before the Court.

B. Legal Standard

1. Correction of Clerical Errors

Rule 60(a) of the Federal Rules of Civil Procedure provides for the correction of clerical errors in district court orders:

> Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission

> may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Fed. R. Civ. P. 60(a).

Rule 60(a) gives a district court the authority to "make an order reflect the actual intentions of the court, plus necessary implications." *Jee v. Hanil Bank, Ltd.*, 799 F.2d 532, 535 (9th Cir. 1986) (quoting *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981)). "Errors correctable under Rule 60(a) include those where what is spoken, written, or recorded is not what the court intended to speak, write or record." *Jee*, 799 F.2d at 532. Under Rule 60(a), a court has "very wide latitude in correcting clerical mistakes in a judgment." *Id.* (quoting *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 676 9th Cir. 1951)).

2. Failure to Exhaust in the ERISA Context

In *Amato v. J.W. Bernard*, 618 F.2d 559, 567-8 (9th Cir. 1980), the Ninth Circuit announced the principle that a district court may find that it lacks jurisdiction to hear a claim under ERISA on the grounds that plaintiff has failed to exhaust his or her administrative remedies. *Amato* has become an authority followed in other circuits in announcing and adhering to the exhaustion requirement. *See Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993); *Makar v. Health Care Corp. of Mid-Atlantic (Carefirst)*, 872 F.2d 80, 83 (4th Cir. 1989). The *Amato* court contemplated that the plaintiff in that case could return to federal court after exhausting administrative remedies. *Amato*, 618 F.2d at 569 ("The court will

still be open to Amato when he has exhausted his appeals before the Trust"). Other courts following *Amato* have similarly contemplated the return of plaintiff after exhaustion in the ERISA context. *See Communications Workers of America v. American Telephone and Telegraph*, 40 F.3d 426, 434 (D.C. Cir. 1994) ("We therefore vacate the District Court's judgment . . . and remand to the District Court with instructions to dismiss the claim without prejudice in order to allow appellees to exhaust their plan remedies."); *Makar*, 872 F.2d at 83 ("We therefore vacate the district court's order and remand the case to be dismissed without prejudice . . . in order to allow the Makars the opportunity to pursue their remedies under the . . . employee benefit plans."); *Harrison v. California Care*, 1994 WL 69469 at *4 (N.D. Cal.) (Patel J.) ("The Harrisons must fully exhaust all Policy grievance procedures before reinstating this action in federal court.")

The principle announced in *Amato*, that a district court may find lack of jurisdiction in the ERISA context based upon plaintiff's failure to exhaust administrative remedies, was applied in *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, (9th Cir. 1995) in the context of summary judgment. Citing *Amato*, the *Diaz* court affirmed the district court's grant of summary on the grounds of failure to exhaust. *Id.* at 1480, 1483. The *Diaz* court did not note or examine the distinction between dismissing for lack of jurisdiction and granting summary judgment. Like the *Diaz* court, other courts have granted or affirmed summary judgment based upon failure to exhaust in the ERISA context. *See Terry v. Bayer Corporation*, 145 F.3d 28, 40 (1st Cir. 1998) (affirming summary judgment for failure to exhaust); *Kennedy*, 989 F.2d at 590, 592 (affirming district court's conversion

of 12(b)(6) motion to a Rule 56 motion because materials in addition to complaint were considered on issue of exhaustion); *Pengilly v. Guardian Life Insurance Co. of America*, 81 F.Supp.2d 1010, 1025 (N.D. Cal. 2000) ("In light of this failure to exhaust, the Court grants defendant's motion for summary judgment").

3. Sanctions

Federal courts have inherent powers to impose monetary or injunctive sanctions against both attorneys and parties for "bad faith" conduct in litigation or for "willful disobedience" of a court order. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). The court's inherent powers are governed by the control necessarily vested in courts to achieve orderly and expeditious outcomes. *See id.* However, this power is "not a broad reservoir of power, ready at an imperial hand, but a limited source. . . . " *Id.* Courts should not rely on their inherent powers where the conduct in question may be adequately addressed under other rules. *See Chambers*, 501 U.S. at 51-52.

In order to impose sanctions against an attorney under its inherent powers, the court must make a specific finding that the attorney acted in "bad faith". *See id.* at 44. "Bad faith" means that the party or counsel acted "vexatiously, wantonly or for oppressive reasons." *Id.* at 45-6. Sanctions under the court's inherent powers cannot be based on mere recklessness. *See In re Keegan Management Co. Secur. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). "A finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous . . . [if] a litigant is substantially motivated by vindictiveness, obduracy, or mala fides. . . . '" *Mark Industries, Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995)

(quoting *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980)).

II. DISCUSSION

A. Parties' Arguments

Plaintiff moves to correct what he views as a clerical error in this Court's June 17, 1997 Order granting summary judgment to then-remaining defendants Paul Revere and UNUM. Plaintiff was covered by two different UNUM policies, one through employer Piper and one through employer Wedbush. It is the Wedbush policy that is at issue in this motion. The Court granted summary judgment to UNUM with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. *See* Order of June 17, 1997 at 30-31. The Court nowhere stated that the claim was "dismissed" or whether it was dismissed with or without prejudice. Plaintiff now argues that the Court should correct this clerical error by indicating that the claim was dismissed without prejudice.

In support, plaintiff cites *In re Marc Rich & Co. A.G.*, 739 F.2d 834, 837-8 (2d Cir. 1984) and *Moore's Federal Practice* for the proposition that under Federal Rule of Procedure 60(a), clerical errors not ruled on explicitly or implicitly by the appellate court may be corrected by the district court even after appeal. Plaintiff also cites *In re Jee*, 799 F.2d 532 (9th Cir. 1986) for the proposition that whenever a dismissal or judgment is silent as to its prejudicial effect, an amendment is appropriate under Rule 60(a). Plaintiff states that it is undisputed that this Court did not indicate its intentions with respect to the prejudicial

effect of the dismissal, and argues that amendment under 60(a) is therefore appropriate.

As for the content of that amendment, plaintiff argues that the amendment should reflect the Court's intention in June of 1997 that the claim be dismissed without prejudice. According to plaintiff, the relevant case law indicates that failure to exhaust should be raised by a motion to dismiss, not a motion for summary judgment. *See Ritza v. Int'l Longshoremen's and Warehousemen's Union*, 837 F.2d 365 (9th Cir. 1988) (failure to exhaust is a matter in abatement, not going to merits of claim, thus not properly raised in summary judgment); *Stauffer Chemical Co. v. Food & Drug Administration*, 670 F.2d 106 (9th Cir. 1982) (failure to exhaust should be raised by motion to dismiss, not motion for summary judgment); *Studio Electrical Technicians v. International Photographers*, 598 F.2d 551 (9th Cir. 1979) (failure to exhaust is a matter in abatement and ordinarily does not deal with merits of case). Once the failure to exhaust is properly considered as an issue for dismissal rather than for summary judgment, plaintiff argues, it should become clear to the Court that the dismissal was intended to be without prejudice, in order to give plaintiff the opportunity to exhaust administrative remedies and then return to the federal courts for redress.

Plaintiff next explains the practical import of the correction it seeks. In the fall of 1999, purportedly in an attempt to exhaust his administrative remedies as directed by this Court, plaintiff resubmitted his claim to UNUM asking them to reconsider its denial of benefits to plaintiff. Rather than consider the claim on the merits, UNUM took the position that this Court's June 17, 1997 summary judgment order was a decision on the merits,

and that UNUM therefore had no legal obligation to review plaintiff's disability claim. At that point, on April 20, 2000, plaintiff brought suit in the Northern District again ("*Sommer III*"), and the case was assigned to Judge Armstrong, who dismissed it upon the motion of UNUM on the grounds of res judicata. *See Sommer v. UNUM Life Insurance*, No. 00-01368-SBA (N.D. Cal. January 8, 2001). Judge Armstrong found that "Judge Jensen's decision [of June 17, 1997] granting summary judgment was a final judgment on the merits of the same claim that plaintiff raises here today." *See id.* at 5. Plaintiff believes that Judge Armstrong's finding that this Court's decision was a "judgment on the merits" is incorrect. If this Court clarifies its June 17, 1997 Order to say that the claim against UNUM with respect to the Wedbush policy was dismissed without prejudice, plaintiff will seek reconsideration of Judge Armstrong's January 8, 2001 order dismissing *Sommer III*.

Defendant UNUM responds that this Court entered "summary judgment," and did not "dismiss" the case, and that therefore the Order of June 17, 1997 represents a final adjudication on the merits. Moreover, defendant cites *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) and *Pengilly v. The Guardian Life Insurance Co. of America*, 81 F.Supp.2d 2010, 1023 (N.D.Cal. 2000) for the proposition that under ERISA, summary judgment should be entered, not a dismissal without prejudice, when a claimant files suit without exhausting administrative remedies. Defendant emphasizes that none of the cases plaintiff cites for the proposition that failure to exhaust should be raised by a motion to dismiss rather than summary judgment (*Ritza, Stauffer*, and *Studio Electrical*) are ERISA cases.

Defendant also argues that plaintiff's motion is not properly brought under Rule 60(a) because it is not actually designed to correct a clerical error, but to affect the substantive rights of the parties. Plaintiff's failure to seek clarification of the order or correction of the purported defect at an earlier time also weighs against plaintiff according to defendant.

Defendant next argues that the motion cannot be granted because the Court cannot alter or amend the ruling of the Ninth Circuit affirming *Sommer I*, which is essentially what plaintiff requests by the instant motion. Defendant contends that by expressly affirming this Court's summary judgment in favor of UNUM, the Ninth Circuit has effectively precluded further review of the issue by this Court.

Finally, defendant moves for sanctions in an amount greater than $3500 on the theory that Judge Armstrong's previous imposition of $1000 and $2500 sanctions did not deter plaintiff from coming back to the Northern District with the same claim that has been rejected several times before. Defendant believes that the Court has the inherent power to sanction plaintiff for bad faith conduct, and additionally that 28 U.S.C. § 1927 authorizes the Court to sanction plaintiff for "multipl[ying] the proceedings in [this] case unreasonably and vexatiously."

B. Analysis

1. Motion to Correct Clerical Mistake

Rule 60(a) gives the Court broad discretion to alter a judgment to reflect what the Court intended at the time of judgment. The question before the Court, then, is what was actually intended when the Court granted summary

judgment to UNUM regarding the Wedbush policy in June of 1997.

The Court begins its analysis with text of its June 17, 1997 Order, which states:

> UNUM argues that because plaintiff failed to appeal this denial of his benefits, his present ERISA claim must fail. While the text of ERISA does not mention an exhaustion doctrine, the Ninth Circuit holds that federal courts should usually require benefits claimants to exhaust their administrative remedies prior to seeking federal court review of a benefits denial. *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *see also Denton v. First National Bank*, 765 F.2d 1295, 1303 (5th Cir. 1985) (citing *Amato*). Here, plaintiff was informed in the April 24, 1996 letter denying his benefits that he had to file any appeal of UNUM's decision within 60 days of receipt of the notice of denial. The letter also apprised plaintiff of the appeal procedures. Rather than file an appeal, plaintiff filed the present lawsuit. Because plaintiff now makes no argument as to why an administrative appeal would have been futile, the Court holds that his present claim is barred for failure to exhaust his administrative remedies.
>
> In sum, the Court finds that summary judgment must be granted in favor of defendants Paul Revere and UNUM on all of plaintiff's claims.

Order of June 17, 1997 at 30-31.

The Court disagrees with plaintiff that the June 17, 1997 Order is ambiguous, and does not indicate its intended prejudicial effect. To the contrary, the Court finds

that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas,* 765 F.2d 1295 (5th Cir. 1985). That Fifth Circuit case reversed a district court's denial of summary judgment in the ERISA context where plaintiff failed to exhaust administrative remedies. The *Denton* court noted that a remand designed to allow a plaintiff to exhaust administrative remedies was often the appropriate disposition in such a situation, but went on to reason that because plaintiff had already had two trials prior to the appeal, providing the Court of Appeals with a "fully fleshed out" record, the Circuit should instead enter judgment for defendant. This Court's citation of *Denton* supports the notion that the Court actually intended to enter judgment and not to dismiss without prejudice, the same route taken by the *Denton* court.

Looking past the text of the June 17, 1997 Order, there is further evidence of this Court's intent to enter summary judgment in the unambiguous Ninth Circuit precedent supporting that result. In *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478 (9th Cir. 1995), decided two years before the June 1997 Order in this case, the Circuit affirmed a district court's grant of summary judgment in the ERISA context on the grounds of failure to exhaust. *Id.* at 1480, 1483. A 1993 case from the Second Circuit provided further support for this Court's conclusion. *See Kennedy*, 989 F.2d at

590, 592 (affirming district court's conversion of 12(b)(6) motion to a Rule 56 motion because materials in addition to complaint were considered on issue of exhaustion). The Court also notes that decision subsequent to the June 17, 1997 Order support the grant of summary judgment in this context. *See Terry v. Bayer Corporation*, 145 F.3d 28, 40 (1st Cir. 1998) (affirming summary judgment for failure to exhaust); *Pengilly v. Guardian Life Insurance Co. of America*, 81 F.Supp.2d 1010, 1025 (N.D. Cal. 2000) ("In light of this failure to exhaust, the Court grants defendant's motion for summary judgment"). While these cases say nothing about the Court's intent at the time of the June 17, 1997 Order, they do indicate the propriety of the Court's conclusion. The Ninth Circuit's affirmance of this Court's grant of summary judgment obviously indicates the same. *See Sommer v. Unum Life Ins. Co., et al.*, Nos. 97-16564, 98-16340 (9th Cir. Mar. 24, 1999).

For all of these reasons, the Court DENIES plaintiff's Motion to Correct a Clerical Mistake.

2. Sanctions

The Court declines to impose sanctions on plaintiff for bringing the instant motion, as the Court finds it was brought neither in bad faith, nor with the intent to multiply proceedings needlessly. In fact, it appears that the question of whether the Court should have dismissed plaintiff's claim without prejudice rather than granting summary judgment is a close one. *See e.g. Amato*, 618 F.2d at 567-8 (affirming district court's decision that it did not have jurisdiction because of failure to exhaust in the ERISA context); *Communications Workers*, 40 F.3d at 434 (remanding with instructions to district court to dismiss

the claim without prejudice in order to allow appellees to exhaust plan remedies); *Makar*, 872 F.2d at 83 (same); *Harrison*, 1994 WL 69469 at *4 (dismissing with statement that plaintiffs "must fully exhaust all Policy grievance procedures before reinstating this action in federal court.") However, because it is apparent that Rule 60(a) calls upon the Court to examine what it intended to do in its June 17, 1997 Order – not what it would do if now presented with the same question – the Court declines to provide plaintiff with the relief he seeks.

III. CONCLUSION

For the foregoing reasons, plaintiff's Motion to Amend a Clerical Mistake is DENIED.

IT IS SO ORDERED

Dated: April 9, 2001

/s/ Lowell Jensen
D. Lowell Jensen
United States District Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 02-203

In The
Supreme Court of the United States

ALEXANDER P. SOMMER
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION BRIEF OF RESPONDENT UNUM LIFE INSURANCE COMPANY OF AMERICA TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The undersigned, counsel of record for UNUM LIFE INSURANCE COMPANY OF AMERICA, certifies that the following listed party has a direct, pecuniary interest in the outcome of this case.

UNUMProvident Corporation

UNUM Life Insurance Company of America

TABLE OF CONTENTS

	Page
I. CITATIONS TO OPINIONS BELOW	1
II. STATEMENT OF THE CASE AND PROCEEDINGS	1
III. REASONS FOR DENYING THE WRIT	8
1. *SOMMER III* WAS BARRED BY THE DOCTRINE OF *RES JUDICATA*	11
2. *SOMMER I* WAS A FINAL DECISION ON THE MERITS	17
3. SUMMARY JUDGMENT IS AN APPROPRIATE ACTION WHERE A PLAINTIFF HAS FAILED TO EXHAUST ERISA ADMINISTRATIVE REMEDIES	18
IV. CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Costantini v. Trans World Airlines, 681 F.2d 1199 (9th Cir. 1982) 13

Denton v. First National Bank of Waco, Texas, 765 F.2d 1295 (5th Cir. 1985) 8, 12

Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust, 50 F.3d 1478 (9th Cir. 1995) 20, 21, 22

Foman v. Davis, 371 U.S. 178 (1962) 11

Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985) 11

Harris v. Jacobs, 621 F.2d 341 (9th Cir. 1980) 13

Hoffman v. Babbitt Bros. Trading Co., 203 F.2d 636 (9th Cir. 1953) 11

International Union of Operating Engineers-Employers Construction Industry Pension, Welfare and Training Trust Funds v. Karr, 994 F.2d 1426 (9th Cir. 1993) 16

Lester v. NBC, 217 F.2d 399 (9th Cir. 1954), cert. denied, 348 U.S. 954, 75 S. Ct. 444, 99 L. Ed. 746 (1955) 16

Pengilly v. The Guardian Life Insurance Co. of America, 81 F.Supp.2d 2010 (N.D.Cal. 2000) 21

Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) 11

Sarraf v. Standard Ins. Co., 102 F.3d 991 (9th Cir. 1996) 22

Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 807, 46 L. Ed. 2d 657 (1976) 16

TABLE OF AUTHORITIES – Continued

Page

Sommer v. UNUM, 1999 U.S. LEXIS 5382 (9th Cir. 1999) 6, 16, 19

Sommer v. UNUM, 1999 U.S. LEXIS 5388 (9th Cir. 1999) ..... *passim*

Sommer v. UNUM Life Ins. Co. of Am., 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002) ..... *passim*

Stein v. Wood, 127 F.3d 1187 (9th Cir. 1997) 5

White v. Jacobs Eng'g Group, 896 F.2d 344 (9th Cir. 1989) 19

FEDERAL STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1001, *et seq.* ..... *passim*

RULES

Federal Rule of Civil Procedure 11 9

Federal Rules of Civil Procedure 12(b)(6) 11

Federal Rule of Civil Procedure 59(a) 12

Federal Rule of Civil Procedure 60(a) 7, 10, 12, 17, 18

OTHER

Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2713 (2d ed. 1983) 11

Wright, Miller & Kane, *Federal Practice and Procedure: Jurisdiction* § 4444 (1981) 11

I. CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reproduced in Petitioner's Appendix ("P's App.") at 1-8 (*Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

The opinion of the District Court denying Petitioner's motion to correct a clerical mistake is reproduced in Petitioner's Appendix at 9-24.

The opinion of the District Court entering judgment in favor of UNUM Life Insurance Company of America ("UNUM") is reproduced in Respondent's Appendix ("R's App.") at 1-10.

II. STATEMENT OF THE CASE AND PROCEEDINGS

Alexander P. Sommer, a securities firm account executive, was an insured under a UNUM group long-term disability plan, established by his former employer Piper Jaffray, Inc. Mr. Sommer was apparently employed by Piper Jaffray from December 1992 through August 1994. After Piper Jaffray terminated Mr. Sommer's employment in August, 1994, he then went to work for Wedbush Morgan Securities. Mr. Sommer was insured under another UNUM group long-term disability plan, established by his next employer, Wedbush Morgan Securities. Mr. Sommer was apparently employed by Wedbush Morgan Securities from August 1994 through January 1996. Despite the fact that Mr. Sommer was employed from 1992 through 1996, he submitted disability claims in 1995 in which he asserted that he was and had been disabled since 1988. (P's App. 10). UNUM denied Mr. Sommer's claim because, among other reasons, he was working full-time during the

period that he claimed that he could not perform all of the material duties of his regular occupation. Mr. Sommer did not appeal the denial of his claim under the Wedbush plan within sixty days, as required by the plan and ERISA. (P's App. 11). The denial of Mr. Sommer's disability claim lead to the ever-reoccurring stream of litigation described below.

Mr. Sommer has litigated this identical disability claim under the same UNUM disability policies[1] in **THREE** separate District Court filings and **FOUR** Ninth Circuit Appeals. In *Sommer I*, the Honorable D. Lowell Jensen granted UNUM's motion for summary judgment regarding Mr. Sommer's disability claims against UNUM under the Wedbush Morgan Securities group long-term disability policy, at issue here. Specifically, as to Mr. Sommer's claim under the Wedbush group policy, Judge Jensen held that his claim was barred for failure to exhaust administrative remedies and granted summary judgment in favor of UNUM. (P's App. 3 & 11).

Mr. Sommer filed a motion for reconsideration of the summary judgment entered against him in *Sommer I*, pursuant to F.R.C.P. Rule 59(a), which was denied by Judge Jensen on August 4, 1997. (P's App. 12). Mr. Sommer did not allege in his motion for reconsideration that there were any clerical errors in the summary judgment. Additionally, Mr. Sommer did not assert in his motion for

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[1] Here, Mr. Sommer only contests the denial of his disability benefits under the Wedbush policy, that was affirmed by the District Courts and the Ninth Circuit on at least six separate occasions. Mr. Sommer is not contesting the denial of his disability claim under the Piper Jaffray policy.

reconsideration that the judgment entered should actually have been a dismissal without prejudice. Instead, Mr. Sommer argued that he should have been excused from exhausting his administrative remedies because exhaustion would have been futile. The District Court rejected Mr. Sommer's argument because plaintiff had every opportunity to raise the futility argument in response to UNUM's summary judgment motion, but failed to do so. Thus, the trial Court would not consider this argument on a motion for reconsideration. Since Mr. Sommer was apparently unsatisfied with Judge Jensen's decision, he appealed *Sommer I* to the Ninth Circuit on August 14, 1997. (P's App. 12).

In addition to filing his appeal of *Sommer I*, on or about August 29, 1997, Mr. Sommer proceeded to refile identical claims for disability benefits with UNUM under the same policies and based upon the same disabilities, which had been previously adjudicated by Judge Jensen and which were now pending before the Ninth Circuit. Mr. Sommer refiled these claims with UNUM based upon the same purported disabilities as had been finally adjudicated by Judge Jensen in *Sommer I*. (P's App. 18).

UNUM responded to Mr. Sommer's refiled August 29, 1997 claims through its attorneys, because of the pending appeal of *Sommer I*. UNUM's attorneys informed Mr. Sommer's attorney that the matter was in litigation, and, therefore, requested that all future communications from Mr. Sommer be directed to UNUM's attorneys, informed Mr. Sommer that any disability claims that he could possibly have had under the UNUM policies had been finally adjudicated by Judge Jensen, and that the policies terminated by their terms when Mr. Sommer completed his employment with Piper Jaffray in August 1994 and

with Wedbush in January 1996. Thus, any claim arising after January 1996 (the termination of the last UNUM policy available to Mr. Sommer) could not possibly be covered by any UNUM policy. (P's App. 19).

On November 13, 1997, Mr. Sommer filed a second action in District Court against UNUM ("*Sommer II*") case number C-97-4159. (P's App. 12). In *Sommer II*, Mr. Sommer contended that he was entitled to benefits under the same UNUM disability policies as a result of the same purported 1988 illness that was the subject of the earlier claim and lawsuit. *Sommer II* alleged claims against UNUM for past disability benefits, future benefits, and breach of fiduciary duty under the same UNUM disability policies based upon the purported August 29, 1997 claim submission to UNUM that was responded to by UNUM's attorneys. (P's App. 12).

On February 17, 1998, UNUM filed and served a Motion to Dismiss *Sommer II* on the grounds that the claims asserted therein had been previously submitted and completely adjudicated in *Sommer I*. In response, Mr. Sommer filed a Motion for Partial Summary Judgment of *Sommer II*, asking the District Court to hold as a matter of law that he was entitled to disability benefits and that UNUM breached its fiduciary duties under ERISA. Mr. Sommer argued that UNUM failed to re-review his re-submitted claim in 1997, and that such failure constituted both grounds for awarding benefits and a breach of fiduciary duty. In UNUM's opposition to Mr. Sommer's motion for partial summary judgment and in UNUM's motion to dismiss, it asserted that Mr. Sommer's claims were barred by the principles of *res judicata*.

The hearing of UNUM's Motion to Dismiss and Mr. Sommer's Motion for Partial Summary Judgment of *Sommer II* occurred on March 23, 1998. At the hearing, Mr. Sommer's counsel conceded that every issue raised in *Sommer II* was raised in *Sommer I*, and was pending before the Ninth Circuit in the appeal of that action.

Judge Armstrong of the District Court issued an Order granting UNUM's Motion to Dismiss and denying Mr. Sommer's Motion for Partial Summary Judgment in *Sommer II*, on March 27, 1998, based upon *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997). Judge Armstrong ruled that she did not have jurisdiction to adjudicate the issues raised in *Sommer II* because all of these claims were already pending before the Ninth Circuit in the appeal of *Sommer I*. Moreover, Judge Armstrong held that, if the court had jurisdiction, Mr. Sommer's claims were barred by *res judicata*. The court further sanctioned Mr. Sommer $1,000 under F.R.C.P. Rule 11. (P's App. 12). Mr. Sommer proceeded to appeal *Sommer II* to the Ninth Circuit. (9th Cir. Case No. 97-16340). (P's App. 12).

On March 24, 1999, after briefing of *Sommer I* and *II* and oral argument, the Ninth Circuit affirmed the ruling in *Sommer I* and held that "Sommer cannot survive UNUM's motion for summary judgment, even under a de novo standard." Further, the Ninth Circuit held that "the district court did not abuse its discretion in declining to consider Sommer's argument that exhaustion of administrative remedies would be futile. Sommer's argument was presented for the first time in a motion for reconsideration following the grant of summary judgment for UNUM and was based on evidence that Sommer had before him at the time of briefing the summary judgment motion." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999).

Additionally, as to *Sommer II,* the Ninth Circuit affirmed the "district court's dismissal of his [*Sommer II*] complaint, summary judgment in favor of UNUM . . . [and affirmed the] denial of Sommer's motion for partial summary judgment." The Ninth Circuit further ruled that Mr. Sommer's claims in *Sommer II* were "barred by the doctrine of *res judicata*." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5382 (9th Cir. 1999).

Then, just as he had done in August, 1997 before filing *Sommer II*, in January, 2000, Mr. Sommer proceeded to attempt to refile with UNUM for a **third time**, the same disability claims based upon the same purported disability, on the same UNUM policies (which had terminated years before). Again, UNUM's counsel informed Mr. Sommer's counsel that his claim had been finally adjudicated by the Ninth Circuit and that his attempt to submit another claim to UNUM, after the matter had been resolved on the merits by the Ninth Circuit, was improper. Mr. Sommer's counsel then filed a third action, *Sommer v. UNUM*, Case #00-1368 SBA ("*Sommer III*"), which is the subject of this Petition for Writ of Certiorari. (P's App. 13).

By refiling his disability claim with UNUM for a **third time** and refiling his lawsuit against UNUM for a **third time**, Mr. Sommer was again merely improperly attempting to circumvent Judge Jensen's, Judge Armstrong's and the Ninth Circuit's prior rulings, which all had become final. In opposing UNUM's motion to dismiss in *Sommer III*, Mr. Sommer attempted to argue, as he has here, that the summary judgment granted in favor of UNUM in *Sommer I* was actually a dismissal without prejudice because the basis of the summary judgment was that he failed to exhaust his administrative remedies under ERISA. Judge Armstrong entered judgment against

Mr. Sommer finding that Judge Jensen's decision of June 17, 1997 granting summary judgment in *Sommer I* was a final judgment on the merits of the same claim that plaintiff raised in *Sommer III*. (P's App. 3). Judge Armstrong dismissed *Sommer III* again based upon the doctrine of *res judicata*.

Further, Judge Armstrong found that the *Sommer III* complaint was frivolous. Sommer's counsel "should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of *res judicata*." (P's App. 5). Judge Armstrong sanctioned Mr. Sommer's counsel $2,500 to serve as a deterrent to further frivolous litigation and awarded UNUM its attorneys' fees. (P's App. 3).

After Judge Armstrong rejected the argument in *Sommer III* that the summary judgment granted in favor of UNUM in *Sommer I* was actually a dismissal without prejudice, true to form, Mr. Sommer filed with Judge Jensen what purported to be a F.R.C.P. Rule 60(a) motion to correct a clerical error in the judgment of *Sommer I*. (P's App. 9). Judge Jensen denied Mr. Sommer's motion finding that the Court granted summary judgment in favor of UNUM in *Sommer I* with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. Further, in finding that the summary judgment issued in *Sommer I* was not a clerical error and that the Order was exactly as the Court intended, the Court stated as follows:

> The Court finds that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a

> separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985), [cases that supported the issuance of summary judgment for failure to exhaust administrative remedies].

(P's App. 22).

Thereafter, Mr. Sommer filed two notices of appeal, one appealing Judge Jensen's Order denying his motion to correct a clerical mistake and the other appealing Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata*. Mr. Sommer's counsel also appealed the $2,500 Rule 11 sanction award and the award of attorneys' fees against him issued by Judge Armstrong in *Sommer III*.

The Ninth Circuit affirmed the Order denying Mr. Sommer's motion to correct a clerical mistake and Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata*. Those rulings are the subject of this Petition for Writ of Certiorari. Additionally, the Ninth Circuit affirmed the $2,500 Rule 11 sanction award and the award of attorneys' fees against Mr. Sommer's counsel issued by Judge Armstrong in *Sommer III*. See *Sommer v. UNUM*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

III. REASONS FOR DENYING THE WRIT

Beginning in the mid-1990s, Alexander Sommer sought disability benefits under policies he obtained

through his employer, Wedbush. Following denial of benefits by UNUM, he sued in federal court. The Ninth Circuit's consideration of Sommer's last Ninth Circuit appeal was the fifth given to his case in the federal courts. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002). This Petition for Writ of Certiorari amounts to Sommer's sixth foray into the federal courts on the same disability claim.

District Court Judge Jensen issued a final judgment in *Sommer I.* The Ninth Circuit affirmed the summary judgment. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173570, 1999 U.S. LEXIS 5388 (9th Cir. 1999). Sommer filed his claim with UNUM again. His claim was for the same disability under the same policy, so UNUM rejected it again. Following this second rejection, Sommer filed his second suit in federal district court. In *Sommer II,* District Judge Armstrong dismissed the case based on lack of jurisdiction because *Sommer I* was pending before the Ninth Circuit and also imposed $1,000 in Rule 11 sanctions. She noted that even if the court did have jurisdiction, *Sommer II* would be barred by *res judicata* as a result of *Sommer I.* The Ninth Circuit agreed, affirming on *res judicata* grounds. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173592, 1999 U.S. LEXIS 5382 (9th Cir. 1999). After yet another rejection of the same disability claim by UNUM, Sommer brought a third suit, again in Judge Armstrong's court. The district court dismissed *Sommer III* on *res judicata* grounds. The district court also imposed $2,500 in Rule 11 sanctions and assessed attorneys' fees and costs against Sommer's attorney pursuant to 29 U.S.C. § 1132(g)(1).

Sommer appealed the *Sommer III* decisions, as well as Judge Jensen's refusal to amend his final judgment in

Sommer I per Sommer's Rule 60(a) motion. The Ninth Circuit affirmed the *Sommer III* district court's decision in all respects and affirmed the *Sommer I* court's denial of Sommer's Rule 60(a) motion for correction of a clerical mistake. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002).

This Petition for Writ of Certiorari purportedly seeks the review of the Ninth Circuit's ruling affirming *Sommer III*. However, the "Question Presented" by Sommer herein – "Did the Court of Appeals for the Ninth Circuit commit judicial error by concluding that in an ERISA case a beneficiary under a long-term disability plan is barred by the doctrine of *res judicata* from filing a second lawsuit to enforce his or her entitlement to benefits, after subsequently exhausting his or her administrative remedies?" – was not at issue in *Sommer III*. Accordingly, this Court must reject Sommer's Petition because Sommer does not have standing to raise the issue presented.

If Sommer wished to dispute District Court Judge Jensen's issuance of a final judgment, instead of a dismissal without prejudice, in *Sommer I*, he needed to raise that issue in the appeal of *Sommer I*. *Sommer v. UNUM Life Ins. Co. of Am.*, 1999 WL 173570, 1999 U.S. LEXIS 5388 (9th Cir. 1999). He did not. He is now foreclosed from doing so by the doctrine of *res judicata*. Sommer cannot avoid the doctrine of *res judicata* by simply refiling his action over and over again.

The only issues that Mr. Sommer can challenge in this Petition for Writ of Certiorari are the Ninth Circuit's affirmance of Judge Armstrong's ruling in *Sommer III* that the action was barred by the doctrine of *res judicata* and Judge Jensen's denial of Mr. Sommer's purported Rule

60(a) motion. Sommer has not raised that issue and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

1. *SOMMER III* WAS BARRED BY THE DOCTRINE OF *RES JUDICATA*

The Ninth Circuit has long recognized that summary judgment affects substantive rights. See *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636, 637 n.1 (9th Cir. 1953). While a complaint that is sought to be dismissed under Rule 12(b)(6) can often be amended, see, e.g., *Foman v. Davis*, 371 U.S. 178, 182, (1962); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2713 (2d ed. 1983), a grant of summary judgment is a final adjudication on the merits. See *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) citing *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4444 (1981). The *Griffith* Court explained that the disposition of a case on summary judgment grounds represents a final adjudication on the merits and forecloses subsequent litigation of the matter. See *Griffith*, 772 F.2d at 825.

Here, although Mr. Sommer characterizes Judge Jensen's ruling in *Sommer I* as a dismissal, the facts establish that summary judgment was entered in favor of UNUM. (See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388, *2, (9th Cir. 1999) "Alexander P. Sommer ("Sommer") appeals from the district court's summary judgment in favor of UNUM Life Insurance Company ("UNUM") and the Paul Revere Life Insurance Company ("Paul Revere"). We have jurisdiction under 28 U.S.C. § 1291 and we affirm."). Moreover, this fact was confirmed again by Judge Jensen, when

he denied Mr. Sommer's purported F.R.C.P. Rule 60(a) motion to correct a clerical error in the judgment of *Sommer I*. (P's App. 9). Judge Jensen denied Mr. Sommer's motion finding that the Court granted summary judgment in favor of UNUM in *Sommer I* with respect to the Wedbush policy on the grounds that plaintiff had failed to exhaust his administrative remedies. Further, in finding that the summary judgment issued in *Sommer I* was not a clerical error and that the Order was exactly as the Court intended, the Court stated as follows:

> The Court finds that a plain reading of the Order indicates the Court's intention to grant summary judgment, with its attendant consequences to plaintiff. First, the Court unequivocally used the words "summary judgment," and entered a separate judgment on the same day against plaintiff and in favor of UNUM. *See* Judgment of June 17, 1997. Second, the Order made no mention of plaintiff's return to this Court after exhaustion. Third, the Order cited *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295 (5th Cir. 1985), [cases that supported the issuance of summary judgment for failure to exhaust administrative remedies].

(P's App. 22).

Accordingly, Judge Jensen's disposition of *Sommer I* on summary judgment grounds represented a final adjudication on the merits.

For the same reasons that the Ninth Circuit decided that *Sommer II* was barred by the doctrine of *res judicata*, *Sommer III* was also barred. In making its finding that *Sommer II* was barred by the doctrine of *res judicata* the Ninth Circuit stated as follows:

Sommer's claims are barred by the doctrine of res judicata. Res judicata bars the relitigation of claims raised (or that could have been raised) and adjudicated in a prior lawsuit involving the same parties. *Costantini v. Trans World Airlines,* 681 F.2d 1199, 1201 (9th Cir. 1982). Whether a suit involves the same "claim" as an earlier suit is determined by looking at four factors:

"(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 1201-02 (quoting *Harris v. Jacobs,* 621 F.2d 341, 343 (9th Cir. 1980)). The fourth factor is the most important. 681 F.2d at 1202.

This case and Sommer's prior lawsuit, *Sommer v. UNUM Life Ins. Co.,* 1999 U.S. LEXIS 5388, No. 97-16564, also pending before this Court, arise out of the same transactional nucleus of facts: Sommer's brain surgeries in 1988 and 1989; Sommer's application for disability benefits from the Paul Revere Insurance Company ("Paul Revere"); Paul Revere's denial of benefits; Sommer's application for disability benefits from UNUM; and UNUM's denial of benefits. Both of Sommer's lawsuits involve the same parties – Sommer, UNUM, and Paul Revere – and the same claim – wrongful denial of disability benefits under ERISA. Sommer's complaint in each case alleges the same disability, the same cause of disability, and the same alleged right to disability benefits under the same

> disability policies. The other three factors also establish that Sommer's second suit involves the same "claim" as his prior suit: prosecution of Sommer's second action would impair the rights established in the prior judgment that UNUM and Paul Revere did not violate ERISA in denying Sommer benefits, substantially the same evidence is presented in the two actions, and the two suits involve infringement of the same right – to recover benefits payable from a benefits plan covered by ERISA.
>
> Sommer argues that he has stated a cause of action different from that raised in his first suit because his current cause of action is based upon "new" medical evidence, reports not considered by UNUM and Paul Revere in denying benefits. Although Sommer labels the evidence "new," this evidence was submitted by Sommer in the prior case in a motion to "augment the administrative record" before the plan administrator. The district court denied that motion and the district court's ruling is an issue in the appeal of Sommer's first suit. Allowing Sommer to proceed with his second suit would circumvent the district court's ruling in that case.
>
> Sommer also argues that his current action is not subject to the doctrine of res judicata because it is a claim for benefits under ERISA. No ERISA case from this Court or any other has carved out such an exception to the rules of procedure and we decline to adopt such a rule. We affirm the district court's dismissal of Sommer's complaint on the ground of res judicata.

Here, again, *Sommer III* and *Sommer I & II* arise out of the same transactional nucleus of facts: Sommer's surgeries in 1988 and 1989; Sommer's application for

disability benefits from UNUM; and UNUM's denial of benefits. All three of Sommer's lawsuits involve the same parties – Sommer and UNUM – and the same claim – purported wrongful denial of disability benefits under ERISA. Sommer's complaint in each of the cases alleges the same disability, the same cause of disability, and the same alleged right to disability benefits under the same disability policies. The other three factors also establish that *Sommer III* involves the same "claim" as his prior suits: prosecution of *Sommer III* would impair the rights established in the prior judgments which were upheld by the Ninth Circuit that UNUM did not violate ERISA in denying Sommer benefits, substantially the same evidence is presented in the three actions, and the three suits involve infringement of the same right – to recover benefits payable from a benefits plan covered by ERISA.

In *Sommer III*, Mr. Sommer made another erroneous claim that he had stated a cause of action different from those raised in *Sommer I & II* because he had now purportedly exhausted his administrative remedies and had a new cause of action based on an alleged denial of disability benefits by UNUM on or about March, 2000. This same allegation was made and rejected in *Sommer II*. Mr. Sommer cannot create a new cause of action by resubmitting a claim under a policy which he acknowledges has long since terminated. This alleged claim is a fiction created by Mr. Sommer and is simply the refiling for a third time of his previously finally adjudicated disability claims with UNUM. All of Mr. Sommer's claims arise from the same disability policies and all claims which could have arisen from those disability policies were previously fully, fairly and finally adjudicated. What Mr. Sommer continues to fail to acknowledge is that the judgment

entered and affirmed in *Sommer I* is a final adjudication on the merits of all of his claims. Once the summary judgment was entered he no longer had any administrative remedies to exhaust. Again, allowing Mr. Sommer to pursue the same claims that were previously resolved both at trial and on appeal in *Sommer III* would circumvent the District Courts' and the Ninth Circuit's rulings in *Sommer I* and *II*.

Under federal law, a party cannot avoid the bar of *res judicata* merely by alleging conduct not previously alleged in their prior suit, nor can a party avoid the bar of *res judicata* by pleading a new legal theory. *Lester v. NBC*, 217 F.2d 399, 400 (9th Cir. 1954), cert. denied, 348 U.S. 954, 75 S. Ct. 444, 99 L. Ed. 746 (1955); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 807, 46 L. Ed. 2d 657 (1976). A review of the pleadings of *Sommer I*, *Sommer II*, *Sommer III*, the District Court's Orders, *Sommer v. UNUM*, 1999 U.S. LEXIS 5382 (9th Cir. 1999), *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999) and *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177 (9th Cir. 2002) conclusively establish that *Sommer III* is merely a regurgitation of the prior actions and an attempt to undermine Judge Jensen's, Judge Armstrong's and the Ninth Circuit's rulings and, as such, Mr. Sommer's present claim is barred by the doctrine of *res judicata*.

The doctrine of *res judicata* "is motivated primarily by the interest in avoiding repetitive litigation, conserving judicial resources, and preventing the moral force of court judgments from being undermined." *International Union of Operating Engineers-Employers Construction Industry Pension, Welfare and Training Trust Funds v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (citation omitted). *Sommer*

III violates principles of *res judicata*, is frivolous and such conduct should not be tolerated by this Court. Judicial resources have been and continue to be wasted by Mr. Sommer's and his attorney's spurious tactics. Under Mr. Sommer's repetitive litigation theory, every matter once finally adjudicated would be subject to endless re-litigation until the matter was resolved to Mr. Sommer's satisfaction. No legal system could function applying Mr. Sommer's rules, and the Federal Court system definitely does not follow Mr. Sommer's rules. Accordingly, the Ninth Circuit's affirmance of Judge Armstrong's dismissal of *Sommer III* based upon the doctrine of *res judicata* is correct. As such, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

2. *SOMMER I* WAS A FINAL DECISION ON THE MERITS

While *Sommer III* was pending before Judge Armstrong, Mr. Sommer filed a motion with Judge Jensen pursuant to Rule 60(a) to correct a purported clerical error in *Sommer I*. In it, Mr. Sommer argued that Judge Jensen's designation of his final order in *Sommer I* as a "summary judgment" rather than a "dismissal judgment" was a clerical error. In his denial of Mr. Sommer's Rule 60(a) motion, Judge Jensen made clear that there was, in fact, no clerical error: he intended his June 17, 1997 order in *Sommer I* to be a summary judgment, and not a dismissal without prejudice.

The Ninth Circuit affirmed the denial of the Rule 60(a) motion. *Sommer v. UNUM Life Ins. Co. of Am.*, 35 Fed.Appx. 489, 2002 WL 972177. Further, the Ninth

Circuit confirmed that the Rule 60(a) motion failed because the Rule "only applies during the pendency of an appeal. By the time Sommer filed his Rule 60(a) motion, the *Sommer I* appeal had been over for nearly two years." (P's App. 8). This further illustrates that if Mr. Sommer wished to contend that the Order of summary judgment in *Sommer I* should have been a dismissal without prejudice, he needed to raise that argument in *Sommer I*. *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999). He did not. Therefore, as explained above, he is forever precluded from raising that argument because of the doctrine of *res judicata*.

3. SUMMARY JUDGMENT IS AN APPROPRIATE ACTION WHERE A PLAINTIFF HAS FAILED TO EXHAUST ERISA ADMINISTRATIVE REMEDIES

Mr. Sommer failed to appeal the denial of his disability claim within the sixty day time period provided under ERISA and expressly stated in the UNUM denial letter and policy. Accordingly, after the sixty day time period for administrative appeal expired without Mr. Sommer requesting an appeal, it was impossible for Mr. Sommer to ever exhaust his administrative remedies because he had failed to request a timely appeal of the denial of his disability claim. In *Sommer III*, Judge Armstrong confirmed this point as follows:

> Plaintiff argues that his claim in the instant case is not barred by *res judicata* because he has finally exhausted his administrative remedies under the UNUM policy by appealing the initial denial of his claim for benefits. He argues that Judge Jensen's finding that plaintiff failed to

> exhaust his administrative remedies is not a final judgment on the merits. It is undisputed, however, that plaintiff failed to appeal the initial denial of benefits with UNUM's Quality Review Board within 60 days, as required by the terms of the plan. Therefore, plaintiff had failed, and was unable, to exhaust his administrative remedies under the disability policy. This Court is not free to rewrite the terms of the Wedbush policy to permit plaintiff's appeal of the initial denial of his claim nearly four years after it was denied. Judge Jensen's decision granting summary judgment was a final judgment on the merits of the same claim that plaintiff raises here today.

(R's App. 6-7).

Further, the sixty day time bar in which a claimant must file their request for appeal under an ERISA plan was affirmed by the Ninth Circuit in *White v. Jacobs Eng'g Group*, 896 F.2d 344, 349 (9th Cir. 1989). Mr. Sommer's contentions that *Sommer I* should have resulted in a dismissal without prejudice and that he has subsequently exhausted his administrative remedies are both completely spurious and irrelevant. When Mr. Sommer chose not to request an appeal with UNUM Life Insurance Company of America of the initial decision to deny his disability claim, he chose not to exhaust his administrative remedies and he cannot change those facts.

The Ninth Circuit affirmed Judge Jensen's ruling in *Sommer I* and held that "Sommer cannot survive UNUM's motion for summary judgment, even under a de novo standard." Further, the Ninth Circuit held that "the district court did not abuse its discretion in declining to consider Sommer's argument that exhaustion of administrative remedies would be futile. Sommer's argument was

presented for the first time in a motion for reconsideration following the grant of summary judgment for UNUM and was based on evidence that Sommer had before him at the time of briefing the summary judgment motion." See *Sommer v. UNUM*, 1999 U.S. LEXIS 5388 (9th Cir. 1999). Now, Mr. Sommer contends that Judge Jensen erred in granting UNUM's motion for summary judgment in *Sommer I* and in not ordering a dismissal without prejudice. Mr. Sommer does not mention that he did not contend or request that the Court Order a dismissal without prejudice during the trial Court proceedings and/or appellate proceedings in *Sommer I* and *II*.

Judge Jensen's grant of summary judgment in *Sommer I* was based upon binding authority that stated under ERISA, summary judgment should be entered, not a dismissal without prejudice, when a claimant fails to exhaust their administrative remedies, as such an action is barred. The purpose of the requirement to exhaust administrative remedies is to alleviate the need for federal courts to make initial claims determinations as well as to allow for the establishment of a record for review by the courts. Indeed, the Ninth Circuit has required that a beneficiary exhaust this plan review process *before* bringing suit, recognizing the exhaustion of administrative remedies requirement as a "matter of sound policy." The Ninth Circuit also recognizes that the failure to exhaust administrative remedies prior to filing suit serves as a bar to the action and results in a binding appealable judgment, not a dismissal without prejudice. See, *e.g.*, *Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). Under ERISA, a claimant must exhaust a plan's internal review procedures, described above, prior to bringing suit in federal

court. *Pengilly v. The Guardian Life Insurance Co. of America*, 81 F.Supp.2d 2010, 1023 (N.D.Cal. 2000); *Diaz v. United Agriculture Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995).

In *Diaz* and *Pengilly*, all actions governed by ERISA, summary judgment was entered against plaintiffs because their actions were barred due to their failure to exhaust their administrative remedies under ERISA. Further, the Ninth Circuit affirmed the entries of summary judgment in *Diaz* and *Pengilly*.

Mr. Sommer improperly contended in *Sommer III*, for the first time, contrary to clear Ninth Circuit precedent, that his failure to exhaust administrative remedies under ERISA should have resulted in a dismissal without prejudice and that, therefore, the entry of summary judgment in *Sommer I* was improper. Clearly, as discussed above, Mr. Sommer's contention is not one that could be advanced in *Sommer III* because of the doctrine of *res judicata*. Be that as it may, Mr. Sommer's contention in that regard is incorrect.

None of the cases cited by Mr. Sommer are governed by ERISA and, as a result, are completely inapplicable to the case at bar. The Ninth Circuit has ruled that a claimant's failure to exhaust his administrative remedies under ERISA results in his action being barred and subject to a summary judgment being entered against the claimant. *See, e.g., Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995). Judge Jensen's granting of summary judgment for UNUM in *Sommer I* was based upon sound binding legal authority and was correct.

Further, in *Sommer III*, the Ninth Circuit correctly confirmed that "summary judgment is an appropriate action where a plaintiff has failed to exhaust ERISA administrative remedies." (P's App. 4). Citing *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust,* 50 F.3d 1478, 1480 (9th Cir. 1995); *Sarraf v. Standard Ins. Co.,* 102 F.3d 991, 992 (9th Cir. 1996).

IV. CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER P. SOMMER,
Plaintiff,
v.
UNUM LIFE INSURANCE,
Defendant.
_____/

No. C 00-01368 SBA
ORDER
(Filed Jan. 8, 2001)

INTRODUCTION

This matter comes before the Court on defendant's motion to dismiss, or in the alternative for summary judgment, and motion for Rule 11 sanctions. Having read and considered all the papers filed in connection with these motions, having considered the arguments advanced by the parties and being fully informed, the Court GRANTS defendant's motion for summary judgment [# 6-1] and GRANTS defendant's motion for Rule 11 sanctions [# 9-1].

BACKGROUND

I. Undisputed, Material Facts

Plaintiff Alexander P. Sommer was employed as an account executive for Henry F. Swift & Co. ("Swift"), a securities firm, from November 1988 through December 1992. In January 1993, Swift merged with Piper Jaffray, Inc. ("Piper"). Plaintiff continued to work as an account executive for Piper until he was fired in August 1994 for

lack of production. Approximately one month later, plaintiff obtained employment as an account executive with Wedbush Morgan Securities ("Wedbush"), where he worked until January 1996. Plaintiff voluntarily left Wedbush after being diagnosed by his neuropsychologist with an organic brain disorder attributable to previous surgeries. While plaintiff worked for Piper and Wedbush, he was covered by a long-term disability policy issued by defendant UNUM Life Insurance Company of America.

Plaintiff underwent three separate brain surgeries in 1988 and 1989. He alleges that as a result of the surgeries, he was totally disabled by organic brain deficits during the times he worked for Swift, Piper, and Wedbush. In September 1994, Plaintiff filed a claim for disability benefits with UNUM payable under the terms of the Piper policy. UNUM rejected plaintiff's claim on July 10, 1995 on the ground that plaintiff was not disabled under the terms of the policy. Defendant reviewed its determination on appeal, and determined that plaintiff was in fact disabled as early as January 1, 1993. Nonetheless, it still determined that plaintiff was ineligible for benefits because of a policy exclusion for pre-existing conditions.

On January 26, 1996, plaintiff filed another disability claim with UNUM under the Wedbush policy. That claim was also denied on April 24, 1996, on the ground that plaintiff was not disabled under the policy. Plaintiff failed to appeal this determination.

II. Procedural History

Plaintiff filed a First Amended Complaint on September 6, 1996, alleging causes of action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. §§ 1001, *et seq.*, against UNUM, the Paul Revere Life Insurance Company, and the administrators of his disability insurance plans (hereinafter, "*Sommer I*"), Case No. C 96-2407 DLJ. Defendant UNUM moved for summary judgment on three issues: (1) standard of review; (2) scope of review; and (3) liability.

On June 17, 1997, Judge Lowell Jensen of the Northern District of California granted defendant's motion. The court concluded that UNUM did not abuse its discretion in denying benefits under the Piper policy. As to the Wedbush policy, the court found that plaintiff had failed to exhaust his administrative remedies since he did not appeal the denial of benefits to defendant's Quality Review Section, as required by the terms of the policy. Plaintiff appealed the district court's grant of summary judgment on August 14, 1997.

On or about August 28 and 29, 1997, plaintiff filed new claims for disability benefits with UNUM under the Piper and Wedbush Policies, respectively.[1] On November 13, 1997, plaintiff commenced a new action ("*Sommer II*") before this Court, Case No. C 97-4159 SBA. In the *Sommer II* complaint, plaintiff adopted the substance of his first amended complaint from the previous action. (Pl. Exhs. D, F)[2] Again, UNUM moved for summary judgment. On

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[1] The parties agree that plaintiff's claims of August 28 and 29, 1997 were denied, though neither party presents evidence of the reasons for the denial.

[2] The main differences are that the new complaint contains dates to reflect a different request for benefits and denials by UNUM; allegations that UNUM denied benefits without conducting any review and a prayer for punitive damages.

March 31, 1998, this Court granted defendant's motion on the grounds that the same issues raised in *Sommer II* were also raised in *Sommer I*, and *Sommer I* was on appeal before the Ninth Circuit. The pending appeal divested this Court of jurisdiction to hear the matter. Moreover, the Court concluded that even if it had jurisdiction over the matter, the issues raised in the complaint were fully adjudicated in the prior action, and plaintiff's claims were therefore barred by the doctrine of *res judicata*. (Pl. Exh. J) The Court also granted a co-defendant's motion for Rule 11 sanctions in the amount of $1,000 against plaintiff. Plaintiff appealed this Court's order granting summary judgment.

On March 24, 1999, the Ninth Circuit affirmed judgments in *Sommer I* and *Sommer II*. As to *Sommer I*, the Ninth Circuit first held that plaintiff's claims could not survive defendant's motion for summary judgment even if the claim denial were subject to a de novo standard of review.[3] It agreed that plaintiff's claim was barred by the pre-existing condition provision of UNUM's policy, and it held that the district court did not abuse its discretion in declining to consider plaintiff's argument that exhaustion of administrative remedies would be futile. With respect to *Sommer II*, the Ninth Circuit held that this Court properly dismissed plaintiff's complaint on the ground of *res judicata*.[4]

On April 20, 2000, plaintiff filed a third complaint against UNUM ("*Sommer III*"). In *Sommer III*, plaintiff

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[3] *See* Pl. Exh. I.

[4] *See* Pl. Exh. H.

again seeks damages for an unlawful denial of benefits under ERISA. He alleges that he has been totally disabled as a result of brain surgeries in 1988, and that this disability existed during the time period he was employed by Wedbush. He also alleges that on or about February 1996, he filed a claim for disability benefits payable under the terms of the Wedbush policy, and that on or about March 2000, UNUM rejected his claim.

DISCUSSION

I. Res Judicata

Defendant argues plaintiff's claim for disability benefits under the Wedbush policy is barred by the doctrine of *res judicata*. A claim is precluded under the doctrine of *res judicata* if it involves the same "claim" as a prior suit, on which a final judgment on the merits was reached, and it involves the same parties or their privies. *Nordhom v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993); *see also Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

The Court finds there to be no genuine dispute that each of the elements of *res judicata* is met in this case. First, plaintiff's claim for disability benefits in this case is the same claim as that asserted by plaintiff against defendant in *Sommer I* and in *Sommer II*. Namely, it is a claim for disability benefits under the UNUM group disability insurance policy issued to plaintiff's former employer, Wedbush Morgan Securities, for the period of September 1994 through January 1996, for an allegedly

disabling condition involving plaintiff's brain that began in November 1988. Second, Judge Jensen granted summary judgment to UNUM on this same claim for disability benefits on the ground that plaintiff had failed to exhaust his administrative remedies. Summary judgment is a final judgment on the merits. *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998). This Court also granted summary judgment to defendant on this claim, in part, on the basis that Judge Jensen's adjudication of this claim rendered it *res judicata*. The Ninth Circuit affirmed the decisions of Judge Jensen and this Court. And, third, plaintiff and defendant were parties to all three cases.

Plaintiff argues that his claim in the instant case is not barred by *res judicata* because he has finally exhausted his remedies under the UNUM policy by appealing the initial denial of his claim for benefits. He argues that Judge Jensen's finding that plaintiff failed to exhaust his administrative remedies is not a final judgment on the merits. It is undisputed, however, that plaintiff failed to appeal the initial denial of benefits with UNUM's Quality Review board within 60 days, as required by the terms of the plan. Therefore, plaintiff had failed, and was unable, to exhaust his administrative remedies under the disability policy. This Court is not free to rewrite the terms of the Wedbush policy to permit plaintiff's appeal of the initial denial of his claim nearly four years after it was denied. Judge Jensen's decision granting summary judgment was

a final judgment on the merits of the same claim that plaintiff raises here today.[5]

II. Sanctions

Defendant also moves for Rule 11 sanctions.[6] Rule 11 imposes a duty on attorneys to certify that all pleadings are legally tenable and well-grounded in fact. *Primus Automotive Fin. Services, Inc. v. Batarese*, 115 F.3d 644, 648 (9th Cir. 1997).[7] Plaintiff's counsel filed a frivolous complaint. He should have known, after *Sommer I* and *Sommer II*, that the claim for benefits under the Wedbush policy was barred by the doctrine of *res judicata*.

Under Rule 11, the sanction imposed may consist of "an order directing payment to the movant of some or all

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[5] *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983), cited by plaintiff, is inapposite. There, the Ninth Circuit observed in a footnote that, although it found no California cases on point, "it appears that California courts would conclude that a denial of a writ of mandamus for failure to exhaust administrative remedies is not a decision on the merits." This statement is dictum concerning a matter of state law. Plaintiff's case is governed by federal law, which holds that summary judgment is a final decision on the merits.

[6] Defendant also requests sanctions under 28 U.S.C. § 1927. To justify the imposition of sanctions under § 1927, defendant must demonstrate subjective bad faith. *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Defendant has not shown that the instant complaint was filed with subjective bad faith on the part of counsel. *See id.* ("[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent"). Defendant's request for § 1927 sanctions is therefore denied.

[7] There is no dispute that defendant complied with the "safe harbor" provisions of Rule 11. Fed. R. Civ. P. 11(c)(1)(A).

of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). However, the sanction imposed must be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2).

Defendant requests an award of $21,000 in attorneys' fees as a sanction, but does not provide an itemization of these fees to enable the court to determine whether the request is reasonable. At the hearing on these motions, plaintiff's counsel argued that an appropriate sanction, if the Court is inclined to impose one, is $2,500.

It is clear that the $1,000 sanction this Court imposed on plaintiff's counsel in *Sommer II* was insufficient to deter another frivolous action against the same defendant. The Court finds that a $2,500 sanction is sufficient deterrence. This amount is 150% more than the sanction imposed in *Sommer II*. In addition, the Court is persuaded by plaintiff's counsel statements in court that this amount would be an appropriate sanction. The Court finds that this sanction should serve as a deterrent to further frivolous litigation by plaintiff's counsel while not being unfair or overly punitive to plaintiff under the circumstances presented herein.[8]

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[8] The Court denies defendant's request for an order requiring prior court approval before plaintiff files any further claims and lawsuits (whether regarding the Wedbush policy or otherwise). There is no basis on this record for such a sweeping order.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment [# 6-1] is GRANTED and defendant's motion for Rule 11 sanctions [# 9-1] is GRANTED. Plaintiff's counsel shall pay defendant's counsel twenty-five hundred dollars ($2,500) as a sanction for filing a frivolous complaint. *Plaintiff shall make this payment on or before March 2, 2001.*

Defendant's request for sanctions under 28 U.S.C. § 1927 and for a "vexatious litigant" order are both DENIED.

IT IS SO ORDERED.

Dated: 1-3-01

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER P. SOMMER,
Plaintiff,
v.
UNUM LIFE INSURANCE,
Defendant.
_____/

No. C 00-01368 SBA
JUDGMENT
(Filed Jan. 8, 2001)

In accordance with the Court's Order granting Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED that final judgment is entered in favor of Defendant.

IT IS SO ORDERED.

Dated: 1-8-01

/s/ S B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

(3)

No. 02-203

Supreme Court, U.S.
FILED
SEP 26 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ALEXANDER P. SOMMER,
and his counsel, JOHN G. WARNER,

Petitioners,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
RESPONDENT'S ARGUMENTS	2
THE DOCTRINE OF RES JUDICATA	3
FIRST CASE NOT DECIDED ON THE MERITS	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 91 S.Ct. 1434 (1971) 3

Carrington Estate Planning Services, et al. v. Reliance Standard Life Ins. Co., 289 F.3d 644 (9th Cir. 2002) 6

Comunale v. Traders & General Ins. Co., 116 Cal.App.2d 198, 253 P.2d 495 (1953) 6

Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust, 50 F.3d 1478 (9th Cir. 1995) 7

Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co., 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987) 6

Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993) 3

Northwestern Title Sec. Co. v. Flack, 6 Cal.App.3d 134, 85 Cal.Rptr. 693 (1970) 6

Sarraf v. Standard Insurance Co., 102 F.3d 991 (9th Cir. 1996) 7

Select Ins. Co. v. Superior Court (Custer), 226 Cal.App.3d 631, 276 Cal.Rptr. 598 (1990) 6

UNUM Life Insurance Company of America v. Ward, 526 U.S. 358, 119 S.Ct. 1380 (1999) 6

White v. Jacobs Engineering Group, 896 F.2d 344 (9th Cir. 1989) 5, 6

INTRODUCTION

The Petitioner, Alexander P. Sommer, is a 65 year old former securities dealer who was forced to retire six years ago due to severe organic brain deficits resulting from three separate brain surgeries in 1988-1989. (App. 10.) At the time he quit working, in 1996, Petitioner was covered under a long-term disability insurance policy issued by Respondent, UNUM. (App. 10.) These are undisputed facts.

When Petitioner sued UNUM to enforce his disability benefits, the district court in the first case entered judgment in favor of UNUM because the district court found that Petitioner had failed to exhaust his administrative remedies. (App. 21.) This point is also undisputed.

Petitioner has brought this second lawsuit against UNUM, this time contending that he has exhausted his administrative remedies.[1]

Thus, the issue before the Court in this petition concerns an important question of nationwide significance:

- May an ERISA benefits claimant file a second lawsuit, when the first lawsuit results in a judgment that the claimant failed to exhaust his or her administrative remedies?

  Petitioner says yes.

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[1] To clarify the record, Petitioner's *second* lawsuit is referred to as *Sommer III* in Respondent's opposition brief.

- Is the failure to exhaust administrative remedies a decision on the merits which would trigger the defense of res judicata?

  Petitioner says no.

- What statute or regulation or case law states that in an ERISA case the failure to exhaust administrative remedies is a decision on the merits?

  Petitioner says none.

- If the Court of Appeals decision below is allowed to stand, will this result in an unjust forfeiture of Petitioner's disability benefits?

  Petitioner says yes.

RESPONDENT'S ARGUMENTS

In its opposition to this petition, UNUM has presented two arguments, namely, (1) that Petitioner's second lawsuit is barred by the doctrine of res judicata because the first lawsuit, the one decided by Judge Jensen in 1997, was a final judgment on the merits; and (2) in an ERISA case a final judgment by the district court that a claimant has failed to exhaust his or her administrative remedies should be treated as a judgment on the merits.

Petitioner will discuss each of these arguments *ad seriatim*.

THE DOCTRINE OF RES JUDICATA

Both the district court and the court of appeals below concluded that this second lawsuit for ERISA benefits was barred by the doctrine of res judicata. (App. 4-5.) However, that conclusion is without merit because one of the elements of the doctrine of res judicata is that the prior case resulted in a final judgment on the merits.

The leading case on this issue is *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-324, 91 S.Ct. 1434, 1440-1441 (1971). In *Blonder-Tongue*, the Supreme Court, applying California law, concluded that the doctrine of res judicata requires proof of three elements, namely that the prior case involved the same claim; that the prior case involved the same parties or persons in privity of interest with them; and that the prior case resulted in a final judgment *on the merits*. This holding in *Blonder-Tongue* has been subsequently followed by all federal courts. See, for example, *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

In the present case the res judicata element in dispute is the one which requires that the prior case result in a final judgment *on the merits*. Petitioner submits that based upon both decisional law and the opinions of the leading commentators on federal civil procedure, as cited in Petitioner's opening brief, it has been held without any exception that a judgment for failure to exhaust administrative remedies is not a final judgment on the merits, and UNUM has not cited a single case or other authority to the contrary.

In conclusion, then, if the prior case, as here, resulted in a judgment in favor of UNUM due to Petitioner's failure to exhaust administrative remedies, such a judgment was

not a final judgment on the merits, therefore the doctrine of res judicata does not apply.

FIRST CASE NOT DECIDED ON THE MERITS

It is undisputed here that *the only reason* the district court dismissed Petitioner's first lawsuit under UNUM's Wedbush disability policy, which is the only disability policy at issue in this petition, was because Petitioner had failed to exhaust his administrative remedies. Proof of this point is found in the district court's decision dated April 9, 2001. (App. 9-24.) In that decision the district court quoted verbatim its entire analysis of Petitioner's claim under the Wedbush disability policy. (App. 21.) In doing so, the district court made the following statement:

> Because plaintiff now makes no argument as to why an administrative appeal would have been futile, the Court holds that his present claim is barred for failure to exhaust his administrative remedies.

(App. 21.)

The district court gave no other reasons for denying Petitioner's first lawsuit. On this point Petitioner and UNUM are in complete agreement. Thus, if, as argued by Petitioner in his opening brief, a judgment in an ERISA case due to failure to exhaust administrative remedies is not a final judgment on the merits, the doctrine of res judicata does not apply and therefore Petitioner's second lawsuit was improperly dismissed.

UNUM attempts to avoid this obvious conclusion by contending that, unlike other administrative or contractual claims, a judgment in an ERISA case for failure to exhaust administrative remedies should be treated as a judgment on the merits.

In making this contention, UNUM has presented two arguments, neither of which has any merit. First, UNUM argues that in its denial letter it stated that Petitioner had only sixty (60) days in which to ask for further administrative review and that since that sixty (60) day period of time has now passed, UNUM states that Petitioner is unable to exhaust his administrative remedies under the disability policy. (R's App. 6-7.) However, it should be noted that the sixty (60) day time limit set forth in UNUM's letter, and relied upon by the district court below, is not a contractual term but simply is a time limit unilaterally imposed by UNUM in its denial form letters. There are no provisions in the ERISA statute or in UNUM's insurance contract which in any way sets forth or enforces this sixty (60) day rule.

UNUM cites the Ninth Circuit case of *White v. Jacobs Engineering Group*, 896 F.2d 344, 349 (9th Cir. 1989) as support for its enforcement of this sixty (60) day time limit. However, the *White* case merely stands for the proposition that failure to exhaust administrative remedies can be asserted as a defense to an ERISA claim. The court in *White* did not discuss what would happen in the event that the claimant's first case was dismissed for failure to exhaust administrative remedies and the claimant then brought a second case after exhausting those remedies.

It should be further noted that whatever holding in the *White* case that has any relevance here was overturned by the Supreme Court in a subsequent case entitled *UNUM Life Insurance Company of America v. Ward*, 526 U.S. 358, 119 S.Ct. 1380 (1999) in which the Court concluded that ERISA did not preempt California's notice-prejudice rule. Under California insurance law, unless an insurer can demonstrate actual prejudice from a late notice, the insured's failure to provide timely notice will not defeat coverage. (*Northwestern Title Sec. Co. v. Flack*, 6 Cal.App.3d 134, 141-143, 85 Cal.Rptr. 693, 696-698 (1970); *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co.*, 189 Cal.App.3d 1072, 1088-1089, 234 Cal.Rptr. 835, 843-844 (1987); *Select Ins. Co. v. Superior Court (Custer)*, 226 Cal.App.3d 631, 276 Cal.Rptr. 598 (1990).) Moreover, under California insurance law if the insurer such as UNUM denies coverage, it waives any claim that the insured failed to comply with the notice provisions of the policy. (*Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 202-203, 253 P.2d 495, 499 (1953).)

It should also be noted in this context that in the absence of prejudice, policy conditions which require the giving of "notice of loss" or the filing of "proof of loss" within a specified period of time should not be applied to work a forfeiture of the insurance claim. (*Carrington Estate Planning Services, et al. v. Reliance Standard Life Ins. Co.*, 289 F.3d 644, 646-647 (9th Cir. 2002), applying the notice-prejudice rule under Arizona law and Rhode Island law similar to California law.)

The second argument made by UNUM in an attempt to persuade this Court that a judgment due to failure to exhaust administrative remedies is a judgment on the merits is its contention that the district court below in the

first case entered a "summary judgment" and not a "dismissal judgment" and in doing so relied upon the cases of *Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1480 (9th Cir. 1995) and *Sarraf v. Standard Insurance Co.*, 102 F.3d 991, 992 (9th Cir. 1996). However, these two cases simply stand for the proposition that the failure to exhaust administrative remedies is a valid defense under ERISA. Neither case discusses what happens in a second case brought by a claimant after exhausting those administrative remedies.

Equally important, it should be noted that the difference between a "summary judgment" and a "dismissal judgment" should not turn on the choice of words used by the trial court but on the reasoning used by the court. Here, it is undisputed that the district court in the first case dismissed Petitioner's claim under UNUM's Wedbush policy due to failure to exhaust administrative remedies. As Petitioner correctly pointed out in his opening brief in support of this writ petition, such a judgment should not be treated as a judgment on the merits, therefore the doctrine of res judicata does not apply.

CONCLUSION

As suggested by Petitioner in his opening brief, the defense of failure to exhaust administrative remedies arises frequently in ERISA cases. When an ERISA case is dismissed for that reason, there is no provision in the ERISA statute or in the legislative history of this statute which would indicate that Congress intended a forfeiture of the claimant's benefits. To prevent such a forfeiture, this

Court should grant this petition and give this issue a full hearing.

Respectfully submitted,

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